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A TEXT-BOOK
OF THE
LAW OF TORT

BY

P. H. WINFIELD

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ST JOHN'S COLLEGE, CAMBRIDGE; OF THE INNER TEMPLE,
HONORARY BENCHER AND BARRISTER-AT-LAW

FOURTH EDITION

LONDON:

SWEET & MAXWELL, LIMITED

2 & 3 CHANCERY LANE, W.C.2

TORONTO:

THE CARSWELL COMPANY
LIMITED

SYDNEY, MELBOURNE, BRISBANE:

THE LAW BOOK COMPANY OF
AUSTRALASIA PTY LIMITED

1948

(Printed in England)

First edition 1937
Second „ 1943
Third „ 1946
Fourth „ 1948

To H. W. and H. G.

A COMPANION WORK

CASES
ON THE
LAW OF TORT

BY

P. H. WINFIELD
KC FBA, LL.D (CANTAB), HON. LL.D
HARVARD AND LEEDS

FOURTH EDITION [1948] in the Press

This selection of Cases, with notes, is designed as a companion volume to the Author's *Text book*. The method adopted is to set out in a headnote the principle of law involved, followed by a short summary of the facts, and a *verbatim* extract from the judgment.

PREFACE TO THE FOURTH EDITION

IT has become a common form commencement of my prefaces to the successive editions of this book to note the amount of rewriting that each edition requires, owing to changes in this branch of the law. I have added references to over eighty decisions reported since the last edition; several of them are of first rate importance and I have accordingly examined them in some detail. Recent statutes that have introduced considerable reforms in the law are the National Insurance (Industrial Injuries) Act, 1946, and the Crown Proceedings Act, 1947. It is possible that the Law Reform (Personal Injuries) Bill may have become law before this edition is published, and, as it proposes the abolition of common employment, I should have had to rewrite that portion of the book, but, with respect to both Acts of Parliament and judicial decisions, I had to halt at the end of March, for my proof of the text of this edition were completed then, and it is common knowledge that nowadays there must be considerable delay between receipt by the publishers of the final proofs and actual issue of the book.

I must repeat again my gratitude to the reviewers of the third edition, and I am much indebted to many of my learned friends for suggestions that they have made, especially Dr. Ellis Lewis, Dr. Glanville Williams, Mr/

Preface to the Fourth Edition

L. E. Megarry, Mr. J. Gordon Stanier, and Professor
Gilbert D. Kennedy.

The next edition of my *Cases on the Law of Tort* will
soon be published, but the references in this edition of
the *Textbook* to “ W. Cases ” are to the third edition.

P. H. WINFIELD.

JOHN'S COLLEGE,
CAMBRIDGE.
May 7, 1948.

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THE LAW OF TORT

CHAPTER I

MEANING OF THE LAW OF TORT

§ 1. Definition of tortious liability.

It seems advisable to begin this book with some attempt to ascertain the scope of its title, and here we are at once in a thicket of difficulties; for it is perhaps impossible to give an exact definition of "a tort", or "the law of tort" or "tortious liability", and, as a corollary, it is certainly impossible to give a definition which will satisfy every theorist who has taken any interest in the topic. There are several reasons for this which have been developed at greater length elsewhere (a). Here it is enough to say that our legal history is largely responsible for all of them and to give a brief summary of them.

(i) In the first place, the chief source of our Law of Tort is the Common Law as opposed to Statute Law. This of course signifies that it is for the most part based on decided cases. Now our Judges have never ceased to contend that their primary duty is to get rid of the dispute before them and to lay down no wider rule than is sufficient to achieve that aim. If some existing principle deducible from previous reported cases is enough to cover the one before them, so much the better from their point of view. If something more is required, they may extend existing principles. If the problem before them is one *primae impressionis*, they may, but will not necessarily, create a new rule to solve it, but even then they have generally preferred to regard this new rule as no more than an application of one already recognised. This cautious attitude makes them loth to indulge in broad general statements. Much less do they relish the manufacture of any abstract definitions of particular legal terms. In fact a ^(b)notorious feature of our case law is the rarity of any necessity for c,

Definition
of
definition

(i) Law
Tort is
based on
Common
Law.

(b)
shows

§ 183.

The Law of Tort

such definitions. Very little acquaintance with the law reports is needed to discover not merely that scientific definitions of such cardinal points in our system as "Tort", "Contract", "Crime", "Property", are lacking, but also that comparatively few opportunities occur to the Courts for constructing them. Nor can it be said that this apparent formlessness has done the development of our Common Law any harm. Indeed, it is not so much formlessness as elasticity that is inherent in the idea of the Common Law. (The Judges have fairly clear, practical notions of the contents of the Law of Tort, the Law of Contract, Criminal Law and the like, even if they have never marked the exact boundaries of each of them, and the sharp outlines of definition are alien to the Common Law.) Compared with Statute Law it is as clay to brick. And theorists who may regret the lack of precise definitions in most branches of our Judge-made law will do well to recollect that where the Legislature embodies—as it frequently is compelled to do—a definition in a statute swarm of judicial decisions has often been necessary to settle what the definition means.

(ii) In the second place, the Law of Tort has grown up like other branches of our law, behind a screen of legal procedure. Until comparatively recent times, the question which arose when a plaintiff sued a defendant for some alleged injury was not "Has the defendant broken some duty which he owed to the plaintiff?" but "Has the plaintiff any form of action against the defendant, and, if so, what form?" If he could not fit his claim into one of the recognised forms of action, he had no legal grievance. An action was (and indeed still is) usually commenced by a royal writ issued from the Chancery which in this sense signified, not a Court of law, but a Government department, one of whose functions was the creation and issue of these writs. It was known also as the *officina brevium* which has been conveniently translated as "the writ-shop" for a plaintiff could not get a writ without paying for it. For a very considerable period of our legal history the shape of the law was no more than a classification of writs.

The neat compartments, "Tort", "Contract", "Real Property", "Criminal Law", in which the student now finds the law distributed, were wholly unknown and would have been quite unintelligible to our ancestors. The classification of the law across any such tidy arrangement of it

passed through a protracted period of parturition between the reigns of Edward III and Elizabeth (b). Again, deceit at first had the peculiar narrow meaning of swindling a Court in some way or another, and it was really one of the forms of abusing legal procedure (c). It developed through the law of sale in particular and the law of contract in general (d), but it did not appear as an independent tort of the type now familiar to us until 1789 in *Pasley v. Freeman* (e). Several other torts emerged in the nineteenth century. Negligence became such (as distinct from meaning merely one mode of committing a wrongful act) somewhere in the neighbourhood of 1820—1830. (f). The rule of strict liability for the escape of noxious things from one's land was laid down in 1868 in *Rylands v. Fletcher* (g). Malicious inducement of breach of contract was held to be a tort in 1881 (h). Since 1900 several decisions have been rendered which leave it doubtful whether some more new torts have not come into being. In 1918, the House of Lords expressly declared it to be an open question whether an action will lie against naval or military authorities for maliciously causing the retirement of an officer (i). Recent dicta in the House of Lords indicate that conspiracy is a tort of a much more general character than it was thought to be (k). There was until quite recently a doubt whether *Brooke v. Bool* (l) had created an independent tort of causing harm by carelessness in a dangerous process; *Honeywill & Stein, Ltd. v. Larkin Bros., Ltd.* (m), seems to have settled that there is such a tort. Finally, it is not clear whether offensive invasion of personal privacy is or is not a tort. Perhaps it is not, but it is still open to the House of Lords to decide that it is (n). At any rate it is clear from these and other instances that the law of tort is steadily expanding and that the idea of its being cribbed, cabined and confined in a set of pigeon-holes is untenable.

(b) Winfield, History of Conspiracy (1921), Ch. V.

(c) Winfield, Hist. of Consp., 33, and Index, "Deceit".

(d) Holdsworth, H. E. L. III, 407—408, VIII, 67—70.

(e) 3 T. R. 51.

(f) 42 L. Q. R. (1926), 184—201.

(g) L. R. 3 H. L. 330.

(h) *Bowen v. Hall* (1881) 6 Q. B. D. 333.

(i) *Fraser v. Balfour* (1918), 87 L. J. K. B. 1116.

(k) *Crofter Harris Trust Co. Ltd. v. Velich*, [1912] A. C. 435, post, § 123.

(l) [1928] 2 K. B. 578.

(m) [1934] 1 K. B. 191. My answer to Salmond, Torts, 117, note (b), and to Professor Goodhart, 2 Mod. Law Rev. 9—10 is that history shows that it is quite possible for the Courts to create new torts unconsciously.

(n) Cf. *Tolley v. Fry & Sons, Ltd.*, [1931] A. C. 333, and post, § 183.

§ 7.

Arguments
for the
second
theory.

(2) The chief supporter of the second theory was the late Sir John Salmond. In his well-known book on the *Law of Torts*, he wrote:

“Just as the criminal law consists of a body of rules establishing specific offences, so the law of torts consists of a body of rules establishing specific injuries. Neither in the one case nor in the other is there any general principle of liability. Whether I am prosecuted for an alleged offence, or sued for an alleged tort, it is for my adversary to prove that the case falls within some specific and established rule of liability, and not for me to defend myself by proving that it is within some specific and established rule of justification or excuse” (o).

The learned author supported his view by the citation of several cases in which the plaintiff suffered manifest injury and yet was unable to recover any damages in an action in tort,—cases in which, as lawyers say, there was *damnum sine injuria*, or harm suffered without the commission of any illegal injury.

Another argument in favour of the second theory was well put by Professor Jenks. It has already been indicated that a weak spot in the second theory is that it appears to regard the list of torts which have specific names as a closed one and to make the creation of new torts by judicial decision impossible. Now Dr. Jenks regarded this as a wrong inference. He admitted that new torts can be, and have been, created; but he contended that this is perfectly consistent with the second theory because these new torts cannot come into being unless the Courts regard them as substantially similar to torts which they have already recognised (p). In his view, these new torts do not owe their origin to any general principle that all unjustifiable harm is tortious.

Replies to
the second
theory.

To the second theory, the following objections may be made. First, Dr. W. T. S. Stallybrass, the learned editor of Salmond's *Law of Torts*, does not support his author on this point; he considers that “although we have not yet discovered any general principle of liability, . . . we are moving in the direction of a general principle of liability” (q).

(o) See, too, Mr. P. A. Landon in *Bell Yard*, No. VIII (1931), 20; Professor A. L. Goodhart in 2 *Modern Law Review* (1938), 1—13.

(p) *Journal of Comparative Legislation*, Vol. XIV (1932), 210.

(q) *Op. cit.*, 17. Dr. Glanville Williams in 7 *Cambridge L. J.* (1939),

Secondly, the cases of *damnum sine injuria* quoted by Sir John Salmond do not really back this theory. What they do prove is something very different, which is this. It does not in the least follow that, because all *unjustifiable* harm is tortious, all harm is tortious, or that any one who has been harmed by his neighbour can go into a law Court with the confident expectation of being accorded a remedy. He will recover nothing if he alleges a specific tort and fails to prove some essential ingredient in it; e.g., if he sues for the tort of deceit and cannot prove deceit (r); or if he sues for the tort of negligence and cannot prove a duty to take care on the part of the defendant (s). Nor can he recover anything if he has underrated the competing legal interests of the defendant; e.g., if the plaintiff has been injured by the defendant's fair competition in trade (t), or by the defendant merely using his own land in a manner which the law considers unobjectionable (u). All the cases cited by Sir John fall under one or other of these categories. In short, it is only unjustifiable harm that is tortious, and this qualification certainly limits, though it does not negative, the power of the Judges to create new torts.

Thirdly, while there is some force in Dr. Jenks' criticism, it seems to be scarcely consistent with facts. Is it really true that all the new torts known to us are substantially similar to torts which were already in existence? Where is the "substantial similarity" between "deceit" of the thirteenth century and the "deceit" which became a tort in 1789? (a). Or between the old liability for cattle trespass and the enormous extension which it received in the rule in *Rylands v. Fletcher*? (b). To what tort is the tort of negligence "substantially" similar? Again, conspiracy as a tort has a far wider signification than the old combination to abuse legal procedure which was redressed by the writ of conspiracy so

111—132, concludes that "there is no comprehensive theory of liability; there is simply a wide and expansible theory" (p. 132). On p. 111, he gives a list of the protagonists on each side.

(r) *Derry v. Peek* (1889), 14 App. Cas. 337.

(s) *Dickson v. Reuter's Telegram Co.* (1877), 3 C. P. D. 1.

(t) *Mogul Steamship Co. v. McGregor, Gow & Co.*, [1892] A. C. 25.

(u) *Mayor of Bradford v. Pickles*, [1895] A. C. 587. The four cases cited in notes (r)—(u) are those quoted by Sir John Salmond in the last edition of his *Torts* for which he himself was responsible. *Corbett v. Burge & Co., Ltd.* (1932), 48 T. L. R. 626, is a later example of failure on the plaintiff's part to prove one of the requisites of a specific tort.

(a) *Pasley v. Freeman*, 3 T. R. 51.

(b) (1868), L. R. 3 H. L. 330.

§ 7.

Conclusion:
there is truth
in both
theories.

far back as Edward I's reign. These are examples only, but there is no need to add more to them here.

In the first edition of this book and more fully elsewhere (c), I had taken the view that the first theory is nearer the truth, but on further consideration I decided to modify it as follows. From a narrow practical point of view, the second theory will suffice, but from a broader outlook, the first is valid. If we concentrate attention on the law of tort at this moment (which is what most practitioners do), entirely excluding the development of the law, past and future, then it corresponds to the second theory. If we take the wider view that the law of tort has grown for centuries and is still growing, then the first theory seems to be at the back of it. It is the difference between treating a tree as inanimate for the practical purposes of the moment (*e.g.*, for the purpose of avoiding collision with it, it is as lifeless as a block of marble) and realising that it is animate because we know that it has grown and is still growing. The caution and slowness which usually mark the creation of new rules by the Judges tend to mask the fact that they have been created; for they have often come into existence only by a series of analogical extensions spread over a long period of time. To vary the metaphor, the process has resembled the sluggish movement of the glacier rather than the catastrophic change of the avalanche. But when once a new tort has come into being, it might fairly seem to have done so, if the whole history of its development is taken into account, in virtue of the principle that unjustifiable harm is tortious. Here, however, I would emphasise the meaning that I attach to "unjustifiable".

Where the Courts hold that the harm is justifiable, there is of course no tort. And they may hold that it is justifiable for any one or more of several reasons. The plaintiff may be asking them to do what they think Parliament is more fitted to do; or he may be alleging a particular tort, without giving proof of some essential requisite of it; or he may be taking an exaggerated view of what is necessary to his own comfort or prosperity; or he may be demanding the creation of a remedy which would throw out of gear other parts of the law. But, subject to these restrictions and looking at the law of torts in the whole of its development, I still incline to the first theory.

(c) 27 Columbia Law Review (1927), 1—11; Province of Tort, Ch. III.

CHAPTER II

GENERAL CONDITIONS OF LIABILITY IN TORT

§ 8. There are certain conditions which must be satisfied before liability in tort can arise. They are:

§§ 8, 9, 10.

General conditions of liability.

- (i) An act or omission on the part of the defendant.
 - (ii) Intention, or negligence, or the breach of a strict duty on the part of the defendant.
 - (iii) Damage resulting to the plaintiff which is not too remote a consequence of the defendant's conduct.
- We must consider these in detail.

§ 9. Act or omission of the defendant.

Act or omission.

There is no need to analyse these terms here. Discussion of them is accessible in any good book on jurisprudence (a).

§ 10. Intention or negligence or the breach of a strict duty.

Intention.

(i) *Intention*.—This signifies full advertence in the mind of the defendant to his conduct, which is in question, and to its consequences, together with a desire for those consequences. But it is essential to add that the interpretation of this definition by the law is often technical.

To begin with, it is impossible for the law to do more than to infer a man's intention, or indeed any other mental state of his, from his conduct. The law may frequently attribute to him an intention which a metaphysician would at most consider very doubtful. Centuries ago, Brian, C.J., said: "It is common knowledge that the thought of man shall not be tried, for the Devil himself knoweth not the thought of man" (b). On the other hand, Bowen, L.J., in 1885, had no doubt that "the state of a man's mind is as much a fact as the state of his digestion" (c). There is no contradiction in these *dicta*. All that Brian, C.J., meant was that no one can be perfectly certain of what passes in the mind of another person. (But Brian would certainly not have dissented from the proposition that in law what a man thinks must be deduced from what he says and does; and that is all that Bowen, L.J., meant.)

(a) *E.g.*, Sir John Salmond, *Jurisprudence* (10th ed., 1947), § 131.

(b) Year Book Pasch. 17 Edw. 4, fol. 2, pl. 2.

(c) *Edgington v. Fitzmaurice* (1885), 29 Ch. D., at p. 483.

§. 10.

Then, again, although intention always implies desire for the consequences of an act or omission, many a wrongdoer has found himself responsible in law for consequences which he not only did not "desire" in the layman's sense of the term, but to which he did not even advert. This results from the rule that "a party must be considered, in point of law, to intend that which is the necessary or natural consequence of that which he does" (d). If I fire a gun at your dog, wishing merely to scare it, and in fact some of the pellets hit it, it does not lie in my mouth to say that I intended only to scare it and not to hit it. And it would be equally idle for me, at any rate in the law of tort, to say that I never wished to hit you, if in fact some of the shot glanced off the ground and wounded you who were standing near your dog. These are simple examples and, indeed, they are consonant with common sense.

Negligence.

(ii) Negligence.—As a mental element in tortious liability, negligence usually signifies total or partial inadvertence of the defendant to his conduct and/or its consequences. In exceptional cases there may be full advertence to both the conduct and its consequences. But, in any event, there is no desire for the consequences, and this is the touchstone for distinguishing negligence from intention (e). A common example of total inadvertence is that of a signalman who falls asleep and thus causes a railway collision. An illustration of full advertence to one's conduct and its consequences without any desire for the latter is *Vaughan v. Menlove* (f). There the defendant had been warned that his haystack was likely to overheat and to take fire which might spread to the land of his neighbour. He said that he would chance it, and he was held liable for the damage which occurred when the stack actually took fire.

We are concerned at this point with negligence merely as a state of mind. But it also has the further meaning of an

(d) *R v Harvey* (1823), 2 B. & C. 257, 264. Cf. 33 Harvard Law Review (1920), 633 (reprinted in Selected Essays on the Law of Torts, 730).

(e) Dr. Charlesworth, *Negligence* (1st ed.) 8-9, denied this, but the authorities that he cited do not refer to desire of consequences; all that they establish is that the phrase "wilful negligence" is used by the Courts and that it is equivalent to recklessness, i.e., conscious indifference of the defendant as to the results of his conduct. But it is quite possible to be thus indifferent and yet not to desire the results. Cf. Lord Wright in *Gaswell v. Powell Duffryn Collieries, Ltd.*, [1916] A. C. 152, 176-177. Dr. Charlesworth's criticism of my view is omitted in his 2nd edition (1947).

(f) (1837), 3 Bing. N. C. 468

independent tort, with the specific name of "negligence". §§ 10, ff.
 Its treatment as such must be postponed until we come to deal with specific torts (g).

(iii) *Breach of strict duty.*—In some torts, the defendant is liable even though the harm to the plaintiff occurred without intention or negligence on the defendant's part. Thus it was laid down in the celebrated case of *Rylands v. Fletcher* (h) that "if a person brings or accumulates on his land anything which, if it should escape, may cause damage to his neighbours, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent damage". This is sometimes styled "absolute" liability, but the epithet is misplaced, as there are possible defences even to torts of this kind, e.g., the act of God excludes liability under the rule in *Rylands v. Fletcher* (i). Breach of strict duty.

§ 14. "Reasonable" and "reasonable man". Reasonable man.

It is convenient to insert here an explanation of the terms "reasonable" and "reasonable man". They recur so frequently in the law of tort, and indeed in every branch of the law (k), that their meaning must be grasped at the outset of this exposition. As to the law of tort, reasonableness is an essential ingredient in the law of negligence, whether that word be used to indicate an independent tort or a mental element in the commission of certain other torts; and more will be said of this in the chapter on Negligence (l). But there are many other torts in which, in one way or another, the idea appears (m). If any broad sense can be extracted from the various significations of "reasonable conduct" it might be described as the behaviour of the ordinary man in any particular event or transaction, including in such behaviour obedience to the special directions (if any) which the law gives him for his guidance in that connexion (n). This is, of course, an abstraction. Lord Bowen visualised

(g) *Post*, Ch. XVI.

(h) (1868), L. R. 3 H. L. 330, 340.

(i) *Post*, § 142; 42 L. Q. R. (1926), 37.

(k) 45 *Harvard Law Review* (1931), 125—126.

(l) *Post*, Ch. XVI.

(m) E.g., false imprisonment, malicious prosecution, nuisance, interference with contract, breach of strict duties of the type in *Indermaur v. Dames* (1866), L. R. 1 C. P. 274; 2 C. P. 311.

(n) Cf. 45 *Harvard Law Review*, 126.

§ 11

the reasonable man as "the man on the Clapham omnibus"; an American writer as "the man who takes the magazines at home, and in the evening pushes the lawn mower in his shirt sleeves" (o). This is good so far as it goes, but it must be added that where a person exercises any calling, the law requires him, in dealing with other people in the course of that calling, to exhibit the degree of skill or competence which is usually associated with its efficient discharge. Nobody expects the man on the Clapham omnibus to have any skill as a surgeon, a lawyer, a docker, or a chimney-sweep unless he is one; but if he professes to be one, then the law requires him to show such skill as any ordinary member of the profession or calling to which he belongs, or claims to belong, would display.

The description of "reasonable" just given is, and can only be, a rough approximation to exactness. As was indicated in it, if the law gives special directions for the guidance of the ordinary man, he must regulate his conduct by them if his conduct is to be regarded as reasonable. Now these directions are often so precise and technical that a man, if he is to ascertain and to act upon them, strikes one as anything but a common-place person, and seems to need the Clapham lawyer at his elbow on many occasions. Here the judicial method, being what it is, shows two rather conflicting tendencies. One is to get as near exactness as may be in the rules relating to what is regarded as reasonable. The other is to recognise that complete exactness is neither attainable nor desirable. Nor is this all. The Judge, assisted by the jury in many cases, has to decide what "reasonable" means, and it is inevitable that different Judges may take variant views on the same question with respect to such an elastic term. An extreme example of this is a case in which "reasonable cause" was an element and the very same act was held by an appellate criminal Court to be a felony punishable with penal servitude for life, and by an appellate civil Court to be not even a tort (p). But conflicts of this sort are very unusual and although we shall find the reasonable man doing some things which a moralist would regard as quixotic and a good

(o) Cited by Greer, L.J., in *Hall v. Brooklands Auto Racing Club*, [1933] 1 K. B. 205, 224. See, too, MacKinnon, L.J., in [1939] 1 K. B., at p. 400.

(p) *R. v. Denyer*, [1926] 2 K. B. 258; *Hardie & Lane, Ltd. v. Chilton*, [1928] 2 K. B. 306; *post*, § 169.

many other things which he would condemn as slovenly or even cowardly, yet the law upon the whole strikes a fair average between these extremes. §§ 12, 13.

Several other phrases will be encountered in the law reports which have sometimes, but not always, a meaning equivalent to "reasonable". Such are "fair", "just", "natural justice". Like certain other phrases (*e.g.*, "judicial discretion"), they show that although law and ethics are distinct topics, it is impossible to make or to administer a civilised system of law without taking account of current ethical ideas^(q).

§ 12. Conditions which in general negative liability.

Conditions
negating
liability.

There are certain cases in which there is no liability, either because intention and negligence are absent, or because liability is negated by some general rule of law. (Each particular tort, of course, has its own peculiar defences) (*e.g.*, truth is a defence to an action for defamation) and these will be discussed in connexion with their appropriate torts. But there are also defences which are of such general application that they must be considered at the outset. They are six in number:

- ✓(1) Harm suffered with the plaintiff's assent (*volenti non fit injuria*).
- ✓(2) Mistake (so far as it is any defence at all).
- ✓(3) Inevitable accident.
- ✓(4) Private defence.
- ✓(5) Necessity.
- ✓(6) Statutory authority.

These must be investigated in detail.

§ 13. *Volenti non fit injuria* (r).

*Volenti non
fit injuria*

There are many occasions on which harm—sometimes grievous harm—may be inflicted on a person for which he has no remedy in tort, because he consented, or at least assented, to the risk of such harm. Simple examples are the injuries received in the course of a lawful game or sport, or in a lawful surgical operation. The effect of such consent or assent is commonly expressed in the maxim "*Volenti non fit injuria*",

(q) Ethics in English Case Law: 45 Harvard Law Review (1931), 112—135.

(r) See Professor F. H. Bohlen's careful analysis in Selected Essays on the Law of Torts (1924, Cambridge, Mass.), 497—542 ("Voluntary assumption of risk"). Mr. D. M. Gordon's criticism of the law in 61 L. Q. R., 140—160, seems too harsh.

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which is certainly of respectable antiquity. The idea underlying it has been traced as far back as Aristotle (s), and it was also recognised in the works of the classical Roman jurists, (t), and in the Canon Law. In English law, Bracton in his *De Legibus Angliæ* (c. A.D. 1250—1258) uses the maxim, though not with the technicality that attached to it later (u), and in a Year Book case of 1305 it appears worded exactly as it is now (a). So far as actual citation of the maxim goes, most of the modern cases use it in connexion with (harm to the person rather than to property. (The explanation seems to be that if the assent is to the infliction of harm on, or at any rate to the use of, the plaintiff's property, such assent is more usually styled *leave and licence* of the plaintiff.) But this phrase expresses much the same idea (b). Moreover, there is no reason for thinking that the maxim itself was confined in time past to injuries to the person (c).

Like most maxims, this one needs some qualification. It would probably be more exact with respect to personal injuries if it ran, "*Volenti non fit periculum injuriæ*", for the cases must be few indeed in which a man voluntarily courts a certain injury. It might appear that he does so in a surgical operation, but the better and broader view seems to be that he will, if the operation is successful, enjoy better health than he did before, and in that sense he cannot be said to assent to certain injury. (What he does assent to is the risk of the operation being unsuccessful.) And that is true of injuries received at football and other games. No player wishes to be hurt; but if he is hurt as a legitimate incident in the game, he recognises it as a risk which has become a reality and which gives rise to no right of action.

Further, "risk" must be taken to mean what any reasonable person would expect. Every one knows, for instance,

(s) T. Beven in *Journal of Comparative Legislation* (1907), 185.

(t) Dig. 47, 10. 1. 5: "*nulla injuria est quæ in volentem fiat*". See, too, Dig. 9 2. 7. 4: 50. 17. 203.

(u) Ed. Woodbine (1942), vol. 4, p. 286: "*cum volenti et scienti non fiat injuria*".

(a) 33—35 Edw. 1 (Rolls Series), 9; Hunt *arguendo*, "*volenti non fit injuria*".

(b) E.g., *Park v. Jobson & Son*, [1945] 1 A. E. R. 222.

(c) Bracton, in the passage cited in note (u), *ante*, uses it generally, and in the Year Book case (note (a), *supra*) it was used in a property action. Manwood, J., in *Grendon v. Bishop of Lincoln* (1576), *Plowden* 493, 501, makes it of general application. In *Horne v. Widlake* (1607), *Yelv.* 141, it was the basis of the decision in a property case.

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that trying to stop a runaway horse is a dangerous affair. If, then, I am injured in assisting you in quieting a restive horse on your cry of "Help," it is idle for me to say, "I knew the horse would plunge, but I did not know how much it would plunge" (d). This is so where there was no reasonable need for me to incur the risk of helping. Where there is such need, as in the "rescue cases" (considered later in this section), different considerations apply.

(The consent may be express,) but it is much more frequently implied.) Where it is express, it is often embodied in a contract, and it is sometimes implied in a contract. Thus, a surgeon usually operates under a contract with his patient, and it is difficult to get modern pugilists into the ring without a preliminary contract between them in which the consideration is substantial (e). In the great majority of games, however, the consent is merely implied and is independent of any contract. There would be something grotesque in the idea of football or cricket teams entering into solemn agreements with their opponents before a match begins. Of course, there may be sports in which an express contract is made between competitors as to the incidence of damage arising from breach of the rules applying to the competition, but this is exceptional (f). For the most part, athletes never intend to create between themselves the legal obligation which alone can give rise to a binding contract.

(Assuming that assent, express or implied, has been given, there are several limitations on its validity.)

✓(a) The process, game or operation to which assent is given must not be one which, quite apart from tortious liability, is banned by the law. ✓

(There is no definite test for deciding what the law will ban in this connexion.) It certainly does not turn upon the act being criminal as well as tortious, for every assault is criminal, and so are some libels, and yet it is possible, by assent, to

(a) Process must not be unlawful

✓(d) *Cutler v. United Dairies (London), Ltd.*, [1933] 2 K. B. 297, 304. Implied assent to the ordinary risks of the highway is considered in § 63, *post*.

(e) In *Chapman v. Ellesmere*, [1932] 2 K. B. 431, Slessor, L.J., held that *volenti non fit injuria* prevented a trainer from suing for the publication of a libel in the Racing Calendar; for, in getting his licence from the Stewards of the Jockey Club, he had impliedly assented to the publication in the Calendar of their subsequent decision to cancel his licence.

(f) *E.g., Clarke v. Dunraven (The Satanita)*, [1897] A. C. 59 (a yacht-race). Cf. Pollock, *Principles of Contract* (12th ed.), 19.

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negative tortious liability for many kinds of assault and libel. Perhaps it would be correct to say that wherever the act is contrary to public policy, *volenti non fit injuria* is inapplicable, but "public policy" is such a vague conception that this does not help much. The best that can be done is to give examples on each side of the line. ✓

✓ Modern football is, of course, lawful (g). ✓ Again, boxing is lawful, though fighting with bare fists is not. "The fists of trained pugilists are dangerous weapons" (h). Even boxing may be unlawful if it be accompanied by sufficient ferocity and severe punishment (i). ✓ Yet again, surgery is lawful provided its object is the cure of the patient. A somewhat embarrassing problem might arise if a person injured in an accident protested against being operated on, and then became unconscious and was kept in that condition by means of an anæsthetic and the operation was performed. If it cured him, and he were foolish enough to sue the surgeon for assault and battery, he could not, assuming that the action would lie, recover more than nominal damages; and, whether the operation were successful or unsuccessful, it is possible that the surgeon would have the defence of necessity (k) even if *volenti non fit injuria* were inapplicable.

Notoriously
dangerous-
process.

A much more difficult question is the determination of how far the maxim applies to occupations or processes which are notoriously dangerous. We are not speaking here so much of common occupations, such as the white-lead trade, the razor-grinding trade, working on a railway, or the like, in which there is certainly a considerable risk of injury to health or to limb; they are practically covered by legislation which casts upon the employer a statutory duty of insurance of the employee. What we have in mind rather, are circumstances in which the risks are much greater than in these normal occupations: *e.g.*, those undertaken by cinematograph actors, which, at any rate in America, are often of a

(g) But its predecessor, as played in Wales during the Tudor and Jacobean period, would certainly not now be tolerated. A greased, wooden ball was carried or hung among a mob, amounting sometimes to 2,000 persons, stripped to the waist. All who had horses rode them and carried hazel sticks of specified circumference with which they beat the footmen on the head until they dropped the ball. The footmen used their fists with similar freedom. *Blackwood's Magazine*, Nov. 1922, p. 573.

(h) *Per Mathew J.*, in *R. v. Coney* (1882), 8 Q. B. D. 534, 547.

(i) *Ibid.* 539, 547, 549.

(k) *Post*, § 18.

foolhardy kind; or by physiologists in experimenting with rarefied air on the breathing system of a human being. Suppose that the actor is injured in trying to jump from an aeroplane on to a railway train while both vehicles are in motion, would the company employing him be able to plead *volenti non fit injuria*? Or could the assistant of a physiologist, who was injured by the experiment, be met by the same defence if he sued the physiologist?

In attempting to solve these questions it seems that a distinction should be taken between injury to the person primarily concerned in the dangerous process and injury to some third person, like the spectator of a tight-rope walking exhibition on whom the performer drops some article.

(1) *Injury to the person primarily concerned* (1).—(Here it might be argued that if the risk were undertaken in pursuance of a contract, nothing is recoverable by the injured person because a contract to commit a tort is unlawful.) But this proposition is too wide and it needs a good deal of qualification. In the first place, a contract whereby A agrees that B shall commit an injury to A, which would otherwise be a tort, is often perfectly lawful: e.g., a private nuisance is frequently permitted by a contract, and so are many trespasses. Secondly, it is not always true that, even if A and B agree between themselves to commit a tort against a third party, the agreement is unlawful: e.g., if they agree to trespass on C's land in order to decide a disputed right of way. Probably the law is best stated by saying that (where the conduct contemplated is likely to menace public morality or safety, or (more broadly) is contrary to public policy, any contract to pursue such conduct is unlawful, and nothing is recoverable by the injured party (m).) *Ea turpi causa non oritur actio*. If this be the correct principle, contracts for cinematograph risks of the kind to which we have referred appear to be unlawful. (Contracts for dangerous experiments in physiology are much more doubtful.) They at least have a scientific purpose which is absent from film risks; perhaps they are lawful unless the degree of danger is very great. It must be remembered that there is no fixed line for determining what

(1) Where actor is injured.

(l) Winfield, *Province of the Law of Tort*, 82—91, where the matter is treated more fully.

(m) *Dann v. Curzon* (1910), 104 L. T. 66, is a curious illustration.

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is public policy. At any given time it is the sense of the community as interpreted by the Courts (n).

*(But we have still to consider the position of the injured party where there is no contract, or where, even if there is one, he wishes to sue in tort.) Can he be met successfully by the defence *volenti non fit injuria*? Unfortunately the reported cases and *dicta* (o) are scanty and the text-books are not in agreement (p). Perhaps the true principle is that which we have suggested in the law of contract. Where the process or occupation is unlawful and where, consequently, the defendant cannot successfully plead *volenti non fit injuria* against a plaintiff who has been injured, it does not necessarily follow that the plaintiff can always maintain an action in tort or that he can never maintain one. Either way, unjust results might ensue, and neither view is supported by authority. A more acceptable rule is that the plaintiff can sue for, and recover, damages in tort unless allowing him to do so would be against public policy in general, or would be the condonation of a breach of public morals or public safety in particular. Thus, in a boxing match, the plaintiff may have inadvertently committed a breach of the rules and this may have provoked the defendant to assault him. To an action for this assault, the defendant cannot plead *volenti non fit injuria*, for such a blow is not a lawful incident in boxing. Nor can it be doubted that the plaintiff could recover at least nominal damages for the assault. There would be nothing contrary to public policy in allowing him to do so. On the other hand, if the whole contest be illegal, like a fight with bare fists, it would appear to be against public policy to allow either combatant to bring an action for assault against the other (q). It seems, then,

(n) 42 Harvard Law Review, 96—100. At a tight-rope walking exhibition in Birmingham in 1863, the female performer, who had enveloped her head in a sack, fell and was killed. No legal proceedings seem to have been taken, but the accident provoked a stern remonstrance from Queen Victoria to the Mayor of Birmingham: Ballantine, *Experiences* (1883), 383—384.

(o) *Clark's Case* (1596), 5 Rep. 64a; *Matthew v. Ollerton* (1694), Comb. 218; *Boulter v. Clark* (1717), Buller N. P. 16 (cited by Cave, J., in *R. v. Coney* (1882), 8 Q. B. D. 534, 538); *Christopherson v. Bare* (1848), 11 Q. B. 473; Hawkins, J., in *R. v. Coney*, *supra*, at p. 553. These are discussed in Winfield, *op. cit.*, 87—88.

(p) Pollock, *Torts*, 126. Salmond, *Torts*, § 8 (4). Clerk & Lindsell, *Torts*, 202. Addison, *Torts*, 70, expresses no opinion. The views are summarised in Winfield, *op. cit.*, 86, note 2.

(q) "The injuries given and received in prize-fights are injurious to the public, both because it is against the public interest that the lives and the health of the combatants should be endangered by blows, and because prize-

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hat different conclusions are possible even with respect to the same tort, and this must necessarily be so wherever public policy is in question (r). § 13.

(2) *Injury to a third person.*—Suppose that a spectator at some unlawful contest or exhibition is injured by one of the participants in it, can he be met by the defence *volenti non fit injuria* if he sues the person who injured him? Here again authority is scanty, but the principle would appear to be that he can recover unless he fully appreciated the risk and nevertheless decided to encounter it (s). Certainly he can do so where the harm arose from some act occurring in a lawful game but which was not a lawful incident in it, e.g., where a golfer is merely exhibiting a stroke, instead of playing the ball, and carelessly strikes an unwitting spectator in the face (t).

(2) Where third person injured.

(b) *The consent must be freely given.*—Only two matters call for comment here. Children of tender years frequently protest vigorously against requisite medicine or surgery, but the practitioner has sufficient legal protection in the consent, on behalf of the child, of its parent or guardian. Presumably a similar rule applies to insane persons. (But upon another point the law is not so clear.) What is the effect of a consent obtained by fraud? (As a general rule it is equivalent to no consent at all. In criminal law, however, the rule is subject to this qualification with respect to assaults. Where the fraud on the victim induces a mistake, not as to the real nature of the transaction, but merely as to the consequences of the transaction, no assault has been committed.) Thus, while it is the felony of rape for a singing master to seduce a female

(b) Consent must be free.

fight is disorderly exhibition, mischievous on many obvious grounds." Per Stephen, J., in *R. v. Coney* (1882), 8 Q. B. D. 534, 549. See, too, Mathew, J., at p. 544. The fight was apparently with bare fists. The case was a criminal one, but the reasoning is well fitted to preventing either combatant from suing the other for injuries received. See, too, *R. v. Donovan*, [1934] 2 K. B. 498. Clerk & Lindsell, *Torts* (8th ed.), 174, questioned whether two men who have been guilty of indecent conduct towards each other could bring cross-actions for assault. Not, I think, upon the principles stated above, for a more outrageous attempt to abuse legal procedure could scarcely be imagined. The 9th ed. (1937) 202, omitted the passage.

(r) For American law, see Bohlen, *Studies in the Law of Torts*, 577, seq.

(s) A Northern Ireland decision (*McKee v. Malcolmson*, [1925] N. I. 120) supports this. A spectator of some motor-cycle races was killed by a cycle which wobbled and hit him. The contest was a nuisance and therefore unlawful. Held, an action was maintainable against the rider of the cycle on behalf of the spectator's relatives under Lord Campbell's Act, 1846

(t) *Cleghorn v. Oldham* (1927), 43 T. L. R. 465; *Gillmore v. L.C.C.* [1938] 4 A. E. R. 331.

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pupil aged sixteen years, by fraudulently making her believe that this would improve her voice (*u*), yet it is no criminal offence for a husband to infect his wife with venereal disease, even though she would never have consented to the connexion if she had been aware of his condition (*x*). In the first case the mistake went to the root of the transaction because the pupil regarded it, not as sexual intercourse, but as a surgical operation. In the second case, the wife was well aware that she was having such intercourse with her husband, but was mistaken as to its possible effects. It has been stated that this distinction taken by criminal law applies also to the tort of battery and that no action for it is maintainable where the victim's mistake is as to the consequences of the act done and not as to its real nature (*a*); but there is no English decision on the point and the law must be regarded as uncertain. In the Irish case of *Hegarty v. Shine* (*b*), the plaintiff was infected by her paramour with a venereal disease the existence of which he concealed. She sued him for assault. The Court of Appeal dismissed the action, partly on the ground that mere concealment was not such a fraud as to vitiate consent, partly because *ex turpi causa non oritur actio* (*c*). ✓

On the point of consent being negated by fraud, it is not clear why the immunity of the offender for a criminal assault should be applied by analogy to liability for the tort of battery. It must be recollected that there is a special reason for denying criminal liability; if no consent be given to sexual connexion and this were held to be a criminal assault, it must logically be also the very serious felony of rape (*d*). Such grave consequences would not necessarily follow if it were held to be the tort of battery. However, quite apart from battery, the wrong may possibly fall under another species of tort,—physical harm to the person not falling under trespasses to the person: see § 68, *post*. (It is probably not the tort of deceit, for deceit requires some false “representation” by the

(*u*) *R. v. Williams*, [1923] 1 K B 340.

(*x*) *R. v. Clarence* (1888), 22 Q. B. D. 23, especially Stephen, J., at p. 43. It would appear from pp. 35, 45, 63, *ibid.*, that *R. v. Bennett* (1868), 4 F. & F. 1105, can be supported, if at all, only on the ground that the girl was asleep at the time of the prisoner's connexion with her, and that she therefore gave no consent at all.

(*a*) Clerk & Lindell, *Torts*, 10th ed., 269. (*b*) (1878), 14 Cox C. C. 115.

(*c*) Note that even if the parties had been husband and wife no action would have been maintainable according to English law, because actions in tort between husband and wife are not in general permissible. *Post*, § 25.

(*d*) *R. v. Clarence* (1888), 22 Q. B. D. 23, 35–36, 45, 63.

defendant and, although a representation may perhaps be inferred from conduct, it cannot be deduced from mere omission unless there be a legal duty to make the representation (e). The unauthorised administration of a noxious drug, whether by way of practical joke or otherwise, to a person who is unaware of its presence or nature, is not a criminal assault (f). Nor is it the tort of battery, for there is no application of force. But it might be infliction of physical harm of the type noticed above.

(c) The maxim is *volenti non fit injuria*; it is not *scienti non fit injuria*.

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(c) Knowledge does not necessarily imply assent.

(It does not follow that a person always assents to a risk merely because he knows of it.) The most conspicuous illustrations of this have occurred in harm sustained by workers in the course of their occupations. Until the latter half of the nineteenth century, very little attention was paid by the law to the safety of manual labourers, and several of the decisions on *volenti non fit injuria* went near to holding that knowledge of risk in the employment invariably implied assent to it. Protective legislation began to make notable headway from about 1860 onwards. And, quite apart from legislation, the Courts, beginning with the judgment of Bowen, L.J., in *Thomas v. Quartermaine* (1887) (g), have declined to identify as a matter of course, knowledge of a risk with acceptance of it (h). In that case the plaintiff was an employee in the defendant's brewery. He tugged at a board in order to remove it from the top of a boiling vat to which the board served as a lid. The lid came away suddenly and he fell into a cooling vat, which was sunk in the floor three feet distant from the boiling vat. It was not adequately fenced and, being full of scalding liquid, the plaintiff was severely injured. A majority of the Court of Appeal held that his action was not

Thomas v. Quartermaine.

(e) *Hegarty v. Shyne* (1878), 14 Cox C. C. 145.

(f) *R. v. Dilworth* (1843), 2 Moody & Rob. 531, where *R. v. Button* (1838), 8 C. & P. 660, was not followed; *R. v. Walkenden* (1845), 1 Cox C. C. 282; *R. v. Hanson* (1849), 2 C. & K. 912.

The rule adopted in the American Restatement of the Law of Torts, Vol. 1, § 57, is more certain and intelligible than our own. Fraud vitiates consent unless the mistake thereby induced relates to a collateral matter, i.e., is one which does not affect the plaintiff's realisation of the nature of the injury inflicted upon him, but which leads him to assent to an injury (the nature of which he knows) because he believes it is to his advantage to assent thereto.

(g) 18 Q. B. D. 683. Cf. *Bloor v. Liverpool, etc., Co., Ltd.*, [1936] 3 A. E. R. 393.

(h) T. Beven in *Journal of Comparative Legislation* (1907), 185—195.

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maintainable. Bowen, L.J., who was one of the majority, pointed out that the danger was one which was incident to a perfectly lawful use of the defendant's premises, that it was visible, that it was appreciated by the plaintiff and that he voluntarily encountered it. The actual decision in *Thomas v. Quartermaine* has not escaped criticism (i), but no exception has ever been taken to Bowen, L.J.'s opinion that mere perception of the existence of a danger is not the same thing as comprehension of it (k).

*Smith v.
Baker.*

(This doctrine was driven home by the House of Lords in *Smith v. Baker* (l), where it was held that *volenti non fit injuria* had no application to harm sustained by a man from the negligence of his employers in not warning him of the moment of a recurring danger, although the man knew and understood that he personally ran risk of injury if and when the danger did recur. He worked in a cutting on the top of which a crane often jibbed (i.e., swung) heavy stones over his head while he was drilling the rock face in the cutting. Both he and his employers knew that there was a risk of the stones falling, but no warning was given to him of the moment at which any particular jibbing commenced. A stone from the crane fell upon and injured him. The House of Lords held that the defendants were liable.) Lord Herschell admitted that "where a person undertakes to do work which is intrinsically dangerous, notwithstanding that reasonable care has been taken to render it as little dangerous as possible, he no doubt voluntarily subjects himself to the risks inevitably accompanying it, and cannot, if he suffers, be permitted to complain that a wrong has been done to him, even though the cause from which he suffers might give to others a right of action"; but he added, "where . . . a risk to the employed, which may or may not result in injury, has been created or enhanced by the negligence of the employer, does the mere continuance in service, with knowledge of the risk, preclude the employed, if he suffer from such negligence, from

(i) Lord Herschell in *Smith v. Baker*, [1891] A. C. 325, 366—367. Cf. Lord Morris, *ibid*, at pp. 366—369; also Pollock, *Torts*, 131; Salmond, *Torts*, 38, note (b). In one point, *Thomas' Case* cannot be supported; the Judges decided as a matter of law that the facts amounted to assent, but it is now settled that the jury must decide this: *Yarmouth v. France* (1887), 19 Q. B. D. 647, 653—655; *Smith v. Baker*, [1891] A. C. at p. 366. Neither of these cases was cited in *Clegghorn v. Oldham* (1927), 43 T. L. R. 465, 467, but the case was left to the jury in spite of Swift, J.'s doubt.

(k) 18 Q. B. D. at p. 696

(l) [1891] A. C. 325 (W. Cases, 1).

recovering in respect of his employer's breach of duty? I cannot assent to the proposition that the maxim, '*Volenti non fit injuria*', applies to such a case, and that the employer can invoke its aid to protect him from liability for his wrong" (m). This hit the difference between the older and the more modern view. There was no disagreement between the two views as to the principle that "a man who enters on a necessarily dangerous employment with his eyes open takes it with its accompanying risks" (n). But some of the earlier Judges like Lord Bramwell credited the worker with a vision keen enough not merely to anticipate the normal risks incidental to his work, but also to foresee negligence on his employer's part, and this harsh fallacy was exposed and rejected in *Smith v. Baker*. Certainly the plaintiff knew of the particular danger which injured him; but that danger was not inevitable, and there was negligence on the defendants' part. In *volenti non fit injuria* a consent given under protest is no consent where a man has to take his choice between that and giving up an occupation which is not normally dangerous; and drilling holes in a rock is not normally dangerous; it was only the defendants' negligence that made it so (o).

The difference between *sciens* and *volens* is also illustrated by *Dann v. Hamilton*, where it was held that A, a passenger in the car of a friend, B, who was driving it and who, to the knowledge of A, was under the influence of drink, could nevertheless recover damages against B for injuries sustained from an accident caused by B's negligent driving; but perhaps not if B's intoxication were so extreme and glaring as to make

(m) *Ibid.*, 360, 362; *Bowater v. Rowley Regis B. C.*, [1944] K. B. 476, and *Baker v. James*, [1921] 2 K. B. 674, illustrate the same point. It may be added here that *volenti non fit injuria* is no defence to breach of a statutory duty cast upon an employer: *Wheeler v. New Merton Board Mills, Ltd.*, [1938] 2 K. B. 669; *post*, § 32. The phrase "absolute" statutory duty used by some of the Judges (pp. 673, 694) seems to mean no more than a duty cast upon the employer which he must see performed whether he delegates it to some one else or not (p. 689).

(n) Cockburn, C.J., in *Woodley v. Metropolitan District Ry.* (1877), 2 Ex. D. 384, 388.

(o) "Freedom of choice predicates, not only full knowledge of the circumstances upon which the exercise of the choice is conditioned, in order that he [the plaintiff] may choose wisely, but the absence from his mind of any feeling of constraint, in order that nothing shall interfere with the freedom of his will": Scott, L.J., in *Bowater v. Rowley Regis B. C.* [1944] K. B. 476, 479; *Read v. Lyons & Co., Ltd.*, [1945] K. B. 216 (in the appeal to the H. L., [1947] A. C. 156. the plea of *volenti non fit injuria* was dropped).

§ 13. A's acceptance of a lift in the car an obviously dangerous operation (p).

Rescue cases. *Rescue Cases (q).*—What are called “rescue cases” deserve a separate paragraph, for they straddle three branches of the law,—*volenti non fit injuria*, remoteness of consequence and contributory negligence, and the two latter may for convenience’ sake be considered here as well as the former in this connexion. Rescue cases are typified by A’s death or injury in rescuing or endeavouring to rescue B from an emergency of danger to B’s life or limb created by the negligence of C. Is C liable to A? Or can C successfully plead (i) *volenti non fit injuria*; or (ii) that A’s conduct is a *novus actus interveniens* which makes his injury too remote a consequence of C’s initial negligence; or (iii) that A’s injury was due to contributory negligence on his own part?

Until 1924, our law was almost destitute of any decision on these questions (r). The American law reports, on the other hand, from 1871 onwards contain some fifty cases which, subject to the limitations stated below, confer a right of action upon the rescuer or his representatives. In 1935, in *Haynes v. Harwood* (s) our Court of Appeal adopted with some cautious qualifications the same principle.

We can best consider the three defences of C to such an action separately:

(i) *Volenti non fit injuria*.—Professor Goodhart, in summarising the American cases, says: “The American rule is that the doctrine of assumption of risk does not apply where the plaintiff has, under an exigency caused by the defendant’s wrongful misconduct, consciously and deliberately faced a risk, even of death, to rescue another from imminent danger of personal injury or death, whether the person endangered is one to whom he owes a duty of protection, or is a mere stranger to whom he owes no such special duty” (t). This was accepted as an accurate representation of English law by

(p) [1939] 1 K. B. 509. The criticism in 55 L. Q. R. 184, seems to be justified. Moreover, A might well have been regarded as disentitled by contributory negligence from recovering.

(q) See Professor A. L. Goodhart’s article on “Rescue and Voluntary Assumption of Risk” in 5 Cambridge Law Journal (1934), 192–203. C. K. Allen, *Legal Duties* (1931), 217–220.

(r) *Roebuck v. Norwegian Titanic Co.* (1884), 1 T. L. R. 117, seems to have been forgotten soon after it was reported.

(s) [1935] 1 K. B. 146 (W. Cases, 5).

(t) 5 Cambridge Law Journal, 196.

Greer, L.J., in *Haynes v. Harwood* (u), where the Court of Appeal affirmed a judgment of Finlay, J., in favour of a policeman who had been injured in stopping some runaway horses with a van in a crowded street. The defendant had left the horses and van unattended on the highway and they had bolted. The policeman, who was on duty, not in the street, but in a police station, darted out and was crushed by one of the horses which fell upon him while he was stopping it. It was also held that the rescuer's act need not be instinctive in order to be reasonable, for the man who deliberately encounters peril after reflection may often be acting more reasonably than one who acts upon impulse (a).

One ventures to regret that the Court of Appeal were not more explicit in the reasons which they gave for their undoubtedly correct decision that *volenti non fit injuria* was no defence. In fact, the defence seems to be irrelevant to the facts in *Haynes v. Harwood*. We can concede that the risk run by the policeman was incidental to his employment as a constable. But here he was suing a third person whose undoubted tort had caused him an injury to the risk of which the policeman had never assented *qua* the third person, however much he may have assented to it *qua* his employers. No one would seriously argue that, because a policeman is bound to arrest a felon and because he cannot object that injuries received in the course of doing so are no part of the risks of his employment, therefore he loses his right to sue for battery a ruffian who half murders him while he is effecting the arrest. Why then should he lose his action for negligence against one who injures him by negligence? It does not follow that, because I assent to a particular risk in my relations with X, I also assent to a particular wrongful act of Y's which causes the risk (b).

(ii) Novus actus interveniens, or remoteness of consequence. The policeman's act was that of a normally courageous man in the like circumstances, and therefore was a direct consequence of the defendant's unlawful act; hence the injury which he suffered was not too remote. "The reasonable man here must be endowed with qualities of energy and courage, and

(u) [1935] 1 K. B. at pp. 156—157, applied in *The Gusty*, [1940] P. 159, and *Morgan v. Aylen*, [1942] 1 A. E. R. 489.

(a) [1935] 1 K. B. at pp. 158—159, 164.

(b) Perhaps Finlay, J., had this in mind in *Haynes v. Harwood*, [1934] 2 K. B. at p. 246, in his quotation from Lord Halsbury.

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he is not to be deprived of a remedy because he has in a marked degree a desire to save human life when in peril" (c). And, even if his duty to intervene were merely a moral one in this case, still "the law does not think so meanly of mankind as to hold it otherwise than a natural and probable consequence of a helpless person being put in danger that some able-bodied person should expose himself to the same danger to effect a rescue" (d). This would cover the case, not merely of the policeman, but of any bystander who had attempted to stop the horses with any reasonable prospect of success even if he risked his own life in the act. Nor would it sanction any foolhardy or unnecessary risks, such as an attempt to stop a runaway horse on a desolate country road (e). Here, as elsewhere in innumerable legal relations, the test is, "What is reasonable?" And it is unreasonable to go to the assistance of a driver merely because he shouts for help to pacify a restive horse which has bolted into a field but which is endangering nobody (f).

(iii) *Contributory negligence*.—This is never a defence unless it is the decisive cause of the plaintiff's injury. In *Haynes v. Harwood*, it was set up but was not much pressed. Indeed, the earlier case of *Brandon v. Osborne, Garrett & Co., Ltd.* (g), had made it improbable that it would have met with any success. There, X and his wife were in a shop as customers. Owing to the negligence of the defendants who were repairing the shop roof, some glass fell from a skylight and struck X. His wife, who was unharmed herself, but who reasonably believed X to be in danger, instinctively clutched his arm and tried to pull him from the spot, and thus injured her leg. Swift, J., held that there was no contributory negligence on her part, provided, as was the fact, she had done no more than any reasonable person would have done.

Do the rules just stated apply where the person who is rescued is the person who was negligent, instead of being some

(c) *Maugham, L.J.*, [1935] 1 K. B. at p. 162.

(d) *Pollock, Torts* (13th ed.), 498, cited by *Maugham, L.J.*, in *Haynes v. Harwood*, [1935] 1 K. B. at p. 163.

(e) *Maugham, L.J.*, *ibid.*, at p. 163.

(f) *Cutler v. United Dairies (London), Ltd.*, [1933] 2 K. B. 297. That seems to be the interpretation of this case by the Court of Appeal in *Haynes v. Harwood* who, while they recognised the decision as sound, disapproved of some dicta of *Scrutton, L.J.* in it. See, too, *Sylvester v. Chapman, Ltd.* (1935), 79 S. J. 777; and *Goodhart*, 5 *Cambridge Law Journal*, 192—203.

(g) [1924] 1 K. B. 548.

third party endangered by the negligent person's conduct? So far we have been considering a case in which A is injured in trying to rescue B from the effects of C's negligence. But is the position the same if A is injured in trying to rescue C himself from peril caused by C's negligence? Would it have made any difference in *Haynes v. Harwood* if the person by whose negligence the horses had bolted had been imperilled and had been saved by the policeman? On principle, it seems that there ought to be no difference. C ought to be just as much liable in the one case as in the other (*h*). The only qualification appears to be this. Unless C is under a legal duty to A to take care, he commits no tort at all by being careless. If C, a competent mountaineer, undertakes a dangerous climb and gets into difficulties from which he can be rescued only by other experts, and A, who is such an expert, is injured in effecting his rescue, C is not liable to A, for he owes no legal duty to A in such a case. But circumstances might possibly put him under a legal duty; e.g., if C were notoriously incompetent, had told A that he intended to undertake the risk, had been urgently advised by A not to do so and had nevertheless ignored the advice although he knew well that if he got into difficulties he would certainly form one of a rescue party. It is hard to see why such facts should not create a legal duty on C's part to take care as defined in Chapter XVI on Negligence (*post*).

Another question is whether a man would be justified in running risks to life or limb in order to save his own or other people's property from evil consequences threatened by the wrongful conduct of another person. In *Hyett v. G. W. Ry.* (*i*), the plaintiff was injured in attempting such a rescue and the Court of Appeal held that, on the facts, his conduct

(*h*) *Dupuis v. New Regina Trading Co., Ltd.*, [1943] 4 D. L. R. 275 (Saskatchewan) favours this view, though on the facts it was held that the defendants were not liable because they had not been negligent. An employee of theirs, by her negligent conduct, had put herself in peril and D was killed in trying to rescue her. Apparently D would have had no remedy against the employee, because there was no obvious danger in going to help her, and the case was not one of "rescue" at all (pp. 285-286).

(*i*) [1947] 2 A. E. R. 264 (the property was that of another person; if it had been the plaintiff's property, presumably his claim would have been even stronger). In *D'Urso v. Sanson*, [1939] 4 A. E. R. 26, 29, it was unnecessary to decide the point. In the Scottish decision, *Steel v. Glasgow Iron & Steel Co.*, [1944] S. C. 237, such an action was held to be maintainable subject to the conditions that (1) the rescuer's act ought reasonably to have been contemplated by the defendant, and (2) the risk undertaken must be reasonable in relation to the interests protected.

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was reasonable and that the defendants were liable; the Court seems to have taken it for granted that the doctrine of *Haynes v. Harwood* applies to rescue of property as well as to rescue of the person. In America the decisions are not uniform, but Professor Goodhart's suggestion is that the only difference between the life and the property cases is that a rescuer would not be justified in exposing himself to as great danger in saving property as he would in saving human life (j). In general, this seems sound in principle, though particular cases are imaginable in which the rescuer might reasonably encounter just as much danger in trying to preserve property as to preserve life; e.g., where documents of great national importance, and of which no copies exist, are in peril of being destroyed by a fire caused by the tortious conduct of some person other than the rescuer.

The scope of *volenti non fit injuria* has been sharply defined in the particular case of harm suffered by one person owing to defects in the premises of another on which he happens to be. This is considered in Chapter XXII on Dangerous Structures (k).

The maxim distinguished from:

(1) Contributory negligence

Volenti non fit injuria must be distinguished from two other defences in the law of tort. They are contributory negligence and inevitable accident.

(1) *Contributory negligence*.—If, though the defendant has been negligent, the plaintiff has also been negligent, this is described as contributory negligence; and the plaintiff's claim is modified by the Law Reform (Contributory Negligence) Act, 1945 (*post*, § 126). Now, Bowen, L.J., considered this to be quite different from *volenti non fit injuria*, for where a danger, not unlawful in itself, is visible, apparent and voluntarily encountered, there is no doubt that the defendant can successfully plead the maxim; but he ought not in such circumstances to be able to plead contributory negligence, for *ex hypothesi* there is no original negligence of his to which the plaintiff's negligence can be contributory (l). However, this distinction has not been closely observed in practice. Suppose that the

(j) 5 Cambridge Law Journal, 198

(k) *Hall v Brooklands Auto Racing Club*, [1933] 1 K. B. 205, is an illustration. See, too, *Letang v Ottawa Electric Ry*, [1926] A. C. 725. Note that the National Insurance (Industrial Injuries) Act, 1946, s. 10, includes in the "course of employment" steps taken by the insured person to rescue persons or property on his employer's premises

(l) *Thomas v. Quartermaine* (1887), 18 Q. B. D. at pp. 698–699. See too, F. H. Bohlen, *Selected Essays on Torts*, 500–501.

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plaintiff in *Smith v. Baker* had said: "I know that you, the defendants, created this risk, and I know its extent. I know also that you are negligent in having created it. But I am willing to take my chance of being injured by it". Surely the correct defence would then have been contributory negligence and not the maxim. Yet there are *dicta* that leave the point doubtful (m).

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(2) *Inevitable accident*.—This is harm not avoidable by any such precaution as a reasonable man could be expected to take. Here the defendant, if he is to be successful, must prove that there was no negligence on his part; but that is not necessary in *volenti non fit injuria*. (2) Inevitable accident.

Plaintiff a wrongdoer.—It is convenient to notice here that the mere fact that the plaintiff is a wrongdoer is, in general, no defence to an action in tort (n). If the rule were otherwise it would lead to the absurd result that if you stole a bottle of whisky belonging to me, I could not sue you for the tort of conversion if it appeared that I bought the bottle during hours prohibited by the Licensing Acts. Probably the rule is that suggested by Sir Frederick Pollock. A wrongdoer is not disabled from suing in tort "unless some unlawful act or conduct on his own part is connected with the harm suffered by him as part of the same transaction" (o). If that be so, he can recover unless his case falls under (i) *volenti non fit injuria*, or (ii) remoteness of damage. There is no need to recognise any such special defence as "the plaintiff was a wrongdoer". Suppose that A, in breach of a statute, is carrying explosives in his pocket in a public street, that he

Plaintiff a wrongdoer.

(m) Lord Herschell, in *Smith v. Baker*, [1891] A. C. at pp. 361—362. Scrutton, L.J., in *Cutler v. United Dairies (London), Ltd.*, [1933] 2 K. B. 297, 303; Finlay, J., and the C. A. in *Haynes v. Harwood*, [1934] 2 K. B. 240; [1935] 1 K. B. 146; Asquith, J., in *Dann v. Hamilton*, [1939] 1 K. B. 509, 516—517. It is submitted that the correct scientific view is stated in Pollock, Torts, 129—131. It should be added that *volenti non fit injuria* has been regarded as another way of saying that the damage is too remote: Scrutton, L.J., and Finlay, J., *supra*. But this also implies that the defendant has done something wrong to begin with, and it seems inconsistent with the true theory of the maxim.

(n) There are many cases on this in the American law reports. See H. S. Davis in Selected Essays on the Law of Torts (1924), 558—571. Some of them are too extreme to be palatable to any English Court, e.g., denial of redress for accidents occurring during Sunday travel in States which have prohibited it. But on a statement of principle, American law does not differ notably from our own. Nearly all the Courts of last resort in the United States agree that any illegal act of the plaintiff which contributes essentially to his injury will prevent recovery; where they differ is as to what constitutes a contributory cause: *ibid.* 558, note 1.

(o) Torts, 137—138.

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is jostled by B, who knows nothing of what A has in his pocket, and that an explosion occurs which injures A (p). If A sought to recover damages from B, B's defence would vary according to circumstances. If the jostling were neither intentional nor negligent, B could plead *volenti non fit injuria* (q); if it were negligent, he could set up remoteness of damage; or, alternatively, the damages recoverable might be reduced on the ground of A's contributory negligence; if it were intentional he might again argue for remoteness of damage. We cannot say, without knowing more of the facts, whether any of these defences is likely to be successful. What is important here is that B's defences are adequately covered in the modes above indicated without any necessity for considering the fact that A happens to be criminally punishable for carrying explosives on the highway (r). Another example would be that of a motorist who breaks the law by driving at forty miles an hour through a town in which a speed limit of thirty miles an hour has been fixed, and is injured by the upsetting of his car owing to bad repair of the road surface. It is submitted that if the decisive cause of the accident were his excessive speed, he ought not to recover damages because they are too remote, or even if they are not too remote, the amount recoverable is reducible because of his contributory negligence; but that if the accident would have occurred even if he observed the speed limit, he ought to be successful in his action (s), unless the bad repair arose from mere nonfeasance. (Post, § 133).

Of harm inflicted on trespassers we shall speak under "private defence" and it will be seen that the mere fact that they are trespassers does not outlaw them (t).

Mistake.

Usually no
defence.

✓ § 14. Mistake.

Mistake, whether of law or of fact, is usually no ground of exemption from liability in tort. There is no need to discuss the rule, *ignorantia juris non excusat*, for that is not peculiar to the law of tort and has been analysed in books on

(p) This example is given by Sir Frederick Pollock, *ibid*.

(q) Or perhaps inevitable accident; but it seems unfair to compel B to disprove any negligence on his part in such circumstances.

(r) The American cases cited by Mr. Davis in his article (*ante*, note (n)) are treated on the basis of remoteness of damage.

(s) The case actually occurred in America: *Heland v. Lowell*, 3 Allen (Mass.), 407; Davis, *op. cit.*, 562—563.

(t) Post, § 17.

jurisprudence. But the rule as to mistake of fact needs some investigation. It has been pushed to harsh lengths, especially in the tort of conversion where an auctioneer, who innocently sells A's goods in the honest and reasonable belief that they belong to B on whose instructions he sells them, has been held liable to A (u). The rule has been defended on the ground that, if it were otherwise, the Courts would find it difficult to discover, as a matter of evidence, whether the belief were honest and reasonable (a). But this is not convincing, for the Courts actually do make this inquiry in criminal law, where mistake of fact is, subject to certain limitations, a defence (b). Moreover, in the law of tort itself they are repeatedly called upon to ascertain whether a man has acted "reasonably" (e.g., in negligence), whatever may be the evidential difficulties incidental to the question; and, be it noted, mistake is sometimes an element in determining reasonableness. Finally, if the burden of proving mistake were, as it always ought to be, on the defendant, it is not likely that he would undertake it without solid reasons in support of it.

But however much the rule may be open to criticism there is no doubt that it is law and it is probably due historically to the stringent liability attaching to trespass to property and to the person. This heritage still sticks in the law in many directions, though it has been removed in others. Matters have perhaps gone too far now to make mistake of fact a general defence in the law of tort, for a good deal of the law relating to trespass, conversion and wrongs of strict liability would need recasting; so, too, as to torts analogous to trespass, such as interference with easements and *profits à prendre*. The typical example of strict liability is *Rylands v. Fletcher* (c). Once admit reasonable mistake as a defence to it, then almost the whole of such liability would disappear and coalesce with the ordinary tort of negligence.

Such exceptions as there are to the rule depend upon whether the defendant acted reasonably or not. There are several torts in which liability hangs upon whether a reasonable man would have done what the defendant did, and mistake becomes relevant here, because a man may quite well

(u) *Consolidated Co. v. Curtis*, [1892] 1 Q. B. 495.

(a) Salmond, *Torts* (7th ed., 1928), § 3 (3); but Dr. Stallybrass does not include this in later editions, § 5 (3).

(b) Kenny, *Criminal Law* (15th ed.), 78—80.

(c) (1868), L. R. 3 H. L. 330; *post*, § 140.

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make one and yet be behaving reasonably. Thus the plaintiff in malicious prosecution must prove lack of reasonable and probable cause for the prosecution, and in false imprisonment reasonable belief on the defendant's part that he has a right to arrest the plaintiff is in certain circumstances a defence. In defamation, mistake is relevant in some instances of publication and privilege. A mistaken belief is a defence to an action for deceit. Again, vicarious responsibility of a master for the tort of his servant may be negatived by a mistake of the servant which puts his wrongdoing outside the course of his employment (*d*). And a mistake induced by the plaintiff himself may be a defence, *e.g.*, where, as a practical joke, he leads a policeman to arrest him for a crime which he has not committed.

Distinguish inevitable accident.

Mistake must be distinguished from the defence of inevitable accident. In mistake the effect produced is intended and the error consists in thinking that such effect is not tortious; in inevitable accident the effect is not intended. If I have a tree ten feet from my neighbour's boundary and erroneously believe his land to be mine, and I cut the tree so that it falls on his land, that is a mistake and is no defence to an action for trespass; but if I knew the land to be his and I cut the tree with all due precaution but it nevertheless falls on his land, that is inevitable accident and I am not liable (*e*).

Again, if I deal with your goods in the honest, but erroneous, belief that I have the right to do so, that is mistake and it constitutes no defence to an action for conversion against me (*f*). But if I am thrown upon your goods as the result of the wilful or negligent act of a third party, that is inevitable accident and I am not liable for trespass.

✓ § 15. Inevitable accident.

Inevitable accident.

Inevitable accident is defined by Sir Frederick Pollock as an accident "*not avoidable by any such precautions as a reasonable man, doing such an act then and there, could be expected to take*" (*g*). It does not mean a catastrophe which

(*d*) Cf. *Poland v. Parr*, [1927] 1 K. B. 236.

(*e*) C. B. Whittier in 15 *Harvard Law Review* (1902), 335—352, especially 336. Cf. Jeremiah Smith, 30 *Harvard Law Review* (1917), 326—327, O. W. Holmes, *Common Law* (1911), 97.

(*f*) *Stephens v. Elwall* (1815), 4 M. & S. 259; *Garland v. Carlisle* (1837), 4 Cl. & Fin. 693.

(*g*) Torts, 107. Cf. *The Marpesia* (1872), L. R. 4 P. C. 212, 220: "an inevitable accident in point of law is this: *viz.*, that which the party

could not have been avoided by any precaution whatever, but such as could not have been avoided by a reasonable man at the moment at which it occurred, and it is common knowledge that a reasonable man is not credited by the law with perfection of judgment. "People must guard against reasonable probabilities, but they are not bound to guard against fantastic possibilities" (h).

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Inevitable accident is undoubtedly a defence at the present day, but Sir Frederick Pollock pointed out that there was some questioning of this in time past, although there was very little real authority for such doubt (i). Independent investigation leads me to conclude that no reported decision is discoverable which negatives inevitable accident as a defence. Yet it would be idle to deny that at one time the idea that it was no excuse was in the air, even if it never took concrete form. The chief causes for this were three. (i) Some *dicta* and ill-reported cases countenanced the idea. (ii) It was further favoured by the old rules of procedure which made it necessary for this defence to be pleaded expressly in many actions; occasionally a defendant who, on the facts, had the defence, forgot this rule and lost his case, and it was hastily inferred by later writers that he had never had it. (iii) Another hasty inference was that, because liability in early English law was strict, therefore a man "acted at his peril" and was never excused by sheer misfortune. But this is an over-statement. Liability for all trespasses was stern, but it was never absolute, as will be shown when we come to deal with torts of strict liability (k). Among the *dicta*, some importance has been attached to one of Grose, J., in *Leame v. Bray* (1803) (l): "Looking into all the cases from the Year Book in the 21 Hen. VII, 28a, down to the latest decision on the subject, I find the principle to be, that if the injury be done by the act of the party himself at the time, or he be the immediate cause of it, though it happens accidentally or by misfortune, yet he is answerable in trespass". For this

Earlier doubts.

charged with the offence could not possibly prevent by the exercise of ordinary care, caution, and maritime skill." *The Saint Angus*, [1938] P. 225; *Ryan v. Youngs*, [1938] 1 A. E. R. 522. Beven, *Negligence in Law* (4th ed., 1928), i, 697—712, gives the history of the topic.

(h) Lord Dunedin in *Fardon v. Harcourt-Rivington* (1932), 16 L. T. 391, 392.

(i) Pollock, *Torts*, 106—115.

(k) *Post*, § 140; 42 L. Q. R. (1926), 37—51.

(l) 3 East 593, 600.

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sweeping assertion the learned Judge produced no authority except the Year Book cited. It does not go anything like "the length of his opinion." The defendant was held to have no defence to trespass (m) in taking tithe corn which was lying cut on the parson's land and storing it in the parson's barn, because it was in danger of being destroyed by beasts going on the land. But it is difficult to see why Grose, J., regarded this as inevitable accident, for in the case itself Kingsmill, J., said: "though the corn was in danger of being lost, yet it was not in such danger that the party shall not have his remedy". This looks as if there were some facts, not disclosed in the report, which showed that the defendant had overrated the peril, and had acted unnecessarily. Far from denying inevitable accident as a defence, Kingsmill and Rede, JJ., put several examples to the contrary. Cases subsequent to that of Henry VII do not lend any more real support to Grose, J.'s, opinion. Indeed, there are decisions the other way (n).

The air was finally cleared in 1891 by *Stanley v. Powell* (o), the soundness of which is now unquestioned save by extremists. Powell was one of a shooting party. He fired at a pheasant. A pellet from his gun glanced off the bough of a tree and wounded Stanley, who was carrying cartridges and game for the party. Stanley sued Powell, who was held not liable for negligence because there was none, nor for trespass to the person because the harm was accidental in the sense that there was no neglect or want of due caution in its occurrence.

Scope.

What is the scope of inevitable accident? Is it a possible defence to any tort? The better opinion seems to be that it is, with the probable exception of the rule in *Rylands v. Fletcher* (p), according to which the occupier of land is liable for damage done by the escape of noxious things from it. But

(m) For technical reasons judgment was not given against him.

(n) *Mitten v. Faudrye* (1624), Popham 161; approved in *Beckwith v. Shordike* (1767), 4 Burr. 2092, 2094; *Aston v. Heaven* (1797), 2 Esp. 533 (sudden fright of coach-horses). Bacon Abr. (7th ed.), Trespass (D), 2.

(o) [1891] 1 Q. B. 86 (W. Cases, 8), in effect following *Holmes v. Mather* (1875), L. R. 10 Ex. 261. See, too, Atkin, L.J., in *Manton v. Brocklebank*, [1923] 2 K. B. 212, 229. Beven, *Negligence in Law*, i, 710-712, is a mixture of fair and unfair criticism of the case. See, too, Mr. P. A. Landon in his edition of Pollock, *Torts*, 110-145. Later cases illustrating the principle are: *Fardon v. Harecourt-Rivington* (1932), 146 L. T. 391; *Jones v. L.C.C.* (1932), 48 T. L. R. 577; and the Canadian decision of *Slattery v. Haley*, [1923] 3 D. L. R. 156; 37 *Harvard Law Review*, 163-164.

(p) (1868), L. R. 3 H. L. 330; *post*, § 140.

we shall see that, even if inevitable accident is no defence to this, still the "act of God" is (*post*, § 142) and that covers some, though not all, of the same ground. It has been contended that in two other instances inevitable accident cannot be pleaded. They are where damage has been done (i) by cattle trespass, (ii) by the escape of fire (q). As to (ii), the authorities cited do not support the contention (r). As to (i), *Ellis v. Loftus Iron Co.* (1874) (s) is quoted, and certainly the judgments of Brett and Denman, JJ., are in favour of the proposition that taking reasonable care to prevent cattle trespass is no defence (t); but the other two Judges were not so emphatic, and it is noteworthy that the case is earlier than *Stanley v. Powell* (u), and that Brett, J., had no better reason for his decision than the archaic rule that the trespass of an animal is the trespass of its owner (a). ✓

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§ 16. Act of God.

It will be shown that the act of God is not of general application as a defence in the law of tort, but is probably limited to negation of liability under the rule in *Rylands v. Fletcher* (b). Logically, therefore, this is not the proper place for considering it. But it is convenient to do so in order to discuss its relation to inevitable accident.

Act of God may be defined as *an operation of natural forces so unexpected that no human foresight or skill could reasonably be expected to anticipate it* (c). It has been suggested that it also has the wider meaning of "any event which could not have been prevented by reasonable care on the part of anyone" (d). This nearly identifies it with inevitable accident, but, however desirable this may be for scientific

(q) Salmond, *Torts* (9th ed.), 26—27; but see 10th ed., 537—538, 559. The learned author also added trespass *quare clausum fregit* and trespass to goods; Dr. Stallybrass regards the point as doubtful; 10th ed., 199—200, 318—319.

(r) *Black v. Christchurch Finance Co.* [1894] A. C. 48 (where defendant was negligent in letting his fire escape).

(s) L. R. 10 C. P. 10.

(t) So, too, Avory, J., *obiter* in *Holgate v. Bleazard*, [1917] 1 K. B. 443, 449.

(u) [1891] 1 Q. B. 86.

(a) Cf. Bell Yard, May, 1938, pp. 5—41. See § 151, *post*.

(b) (1868), L. R. 3 H. L. 330. *Post*, § 140.

(c) Pollock, *Torts*, 393, is apparently to this effect. For periodical literature, see W. A. Bewes, 152 *Law Times* (1921), 235; W. Larremore, 18 *Yale Law Journal* (1909), 338.

(d) Salmond, *Torts* (7th ed., 1928), § 93 (2).

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arrangement of the law, there is no sufficient authority to back this view (e).

(*Nichols v. Marsland* (f)) is the case commonly cited as illustrating an act of God. For many years there had been some artificial ornamental lakes on the defendant's land. They had been formed by damming up a natural stream the source of which was at a point higher up than the defendant's land. An extraordinary rainfall, "greater and more violent than any within the memory of the witnesses", caused the stream and lakes to swell to such an extent that the artificial banks burst and the escaping water rushed on to the plaintiff's land and carried away four county bridges. The plaintiff sued on behalf of the county, contending that the defendant was liable under the rule in *Rylands v. Fletcher* (g). Judgment was given for the defendant. The jury had found that she was not negligent and the Court of Exchequer Chamber, affirming the decision of the Court of Exchequer, held that she ought not to be liable for an extraordinary act of nature which she could not reasonably anticipate. Note that it was "reasonably anticipate", not "possibly anticipate". It was physically possible for her to have prevented the accident by building banks (say) ten times higher, but that would have been an unpractical burden to cast upon any reasonable use of her land (h). As was said in another case, one "is bound to provide against the ordinary operations of nature, but not against her miracles" (i).

The principle underlying *Nichols v. Marsland* is unquestioned, but the decision itself has aroused adverse criticism in later cases, notably in *Greenock Corporation v. Caledonian Ry.* (k). The Corporation, in laying out a park, constructed a concrete paddling pool for children in the bed of a stream and thereby altered its course and obstructed its natural flow. Owing to rainfall of extraordinary violence, the stream overflowed at the pond and a great volume of water, which would have been safely carried off by the stream in its natural course, poured down a street and flooded the property of the railway company. It was held by the House of Lords that this was

(e) *Ibid.*, p. 359, note (x), by Dr. Stallybrass, who in the 10th ed., 531, note (l) seems definitely to have abandoned Salmond's view.

(f) (1875-1876), L. R. 10 Ex. 255; 2 Ex. D. 1 (W. Cases, 14).

(g) (1868), L. R. 3 H. L. 330.

(h) L. R. 10 Ex. at pp. 258-259.

(i) Lord Finlay, L.C., in *Greenock Corporation v. Caledonian Ry.*, [1917] A. C. 556, 572

(k) [1917] A. C. 556.

not *damnum fatale* (the equivalent in Scots law of the "act of God") and that the Corporation was liable. Some of the noble and learned Lords cast doubt upon the finding of facts by the jury in *Nichols v. Marsland* (l); two of them distinguished it on the ground that what the Court dealt with in *Nichols v. Marsland* was the storing of water in a reservoir and not with interference in the course of a natural stream (as in the *Greenock Corporation Case*) (m), and that anyone who does interfere with it must provide against even an extraordinary rainfall; and two others on the ground that no one could say that such a rainfall was unprecedented in Scotland (n).

As a technical term, "act of God" is untheological and infelicitous (o). It is an operation of "natural forces" and this is apt to be confusing in that it might imply positive intervention of the deity. This (at any rate in common understanding) is apparent in exceptionally severe snowfalls, thunderstorms and gales. But a layman would hardly describe the gnawing of a rat as an act of God, and yet the lawyer may, in some circumstances, style it such (p). The fact is that in law the essence of an act of God is not so much a positive intervention of the deity as a process of nature not due to the act of man (q), and it is this negative side which needs emphasis.

It is doubtful whether the act of God is of general Scope.

(l) At pp. 573—574, 575, 580, 581.

(m) Lord Finlay, L.C., at p. 573; Lord Wrenbury, at p. 584. This view of the facts in *Nichols v. Marsland* does not square with the report in L. R. 10 Ex. at p. 256, where it is stated that the defendant's artificial embankment "diverted and dammed up" a "natural stream".

(n) Lord Dunedin, at p. 577; Lord Shaw of Dumfermline, at pp. 579—580. *City of Montreal v. Watt & Scott, Ltd.*, [1922] 1 A. C. 555, and *dicta* in *Att.-Gen. v. Cory Bros.* (1919), 35 T. L. R. 570, 574; [1921] 1 A. C. 521, 536—537, merely indicate that violent storms are less likely to be extraordinary in regions of Wales and of Canada than in England.

(o) *Vis major* would be better, but it also includes acts of the King's enemies: *Simmons v. Norton* (1831), 7 Bing. 640, 648.

(p) It is not so where reasonable precautions can keep the rat out: that is possible in a ship, if not always in a warehouse: *Garstons v. Taylor* (1871), L. R. 6 Ex. 217, 220, 221; Carver, *Carriage by Sea* (8th ed., 1938), § 10.

(q) "Something in opposition to the act of man": Lord Mansfield in *Forward v. Pittard* (1785), 1 T. R. 27, 33, and again in *Tient and Mersey Navigation v. Wood* (1785), 4 Dougl. 286, 290. In *Salmond, Torts*, § 142 (3), it is pointed out that, for purposes of the law of tort, all natural agencies, as opposed to human activities, are acts of God, and not merely those of extraordinary violence or unusual occurrence; and that violence or rarity is relevant only in considering whether the calamity could have been prevented by reasonable care.

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application as a defence to liability in tort (r). On principle it is hard to see why it should be limited to the rule in *Rylands v. Fletcher* (s), even if there are some torts to which it is quite inappropriate; e.g., seduction, wrongs of intimidation, or wilful inducement of breach of contract. It seems curious, too, that as a technical term in the region of pure tort, "act of God" is comparatively modern in origin (t), though it is old enough in connexion with contract and with bailees in general and common carriers in particular. The explanation is, as Professor Wigmore suggests, that both "act of God" and "inevitable accident" were, in the older law, disguised under other phrases such as "inevitable necessity", "could not do otherwise", "unavoidable accident", "absence of negligence or blame" (u); moreover, there was a tendency to say that wind or storm excused, without reference to the author of either (a). These masking terms not only persisted in modern times but actually survive at the present day. In *Blyth v. Birmingham Waterworks Co.* (1856) (b), the bursting of a plug in a water-main by an extraordinary frost might well have been described either as an act of God or as inevitable accident. In fact, no reference was made to either and the *ratio decidendi* was merely that there was no evidence of negligence on the defendants' part (c).

Even nowadays no practical harm is done by the restriction of act of God to the rule in *Rylands v. Fletcher*, for inevitable accident, which is a defence to other torts, comes to much the same thing.

Relation to
inevitable
accident.

This brings us to the question of the relation of act of God to inevitable accident. Why, it may be asked, is there any need for "act of God" as an independent defence when

(r) See §§ 151, 156, *post*. Halsbury, *Laws of England* (2nd ed.), vol. 32, §§ 295—296, regards it as of general application, but the authorities cited do not go so far.

(s) In *Ryan v. Youngs*, [1938] 1 A. E. R. 522, the C. A. held that it applied to nuisance, but they evidently regarded the particular nuisance as allied to the type of liability in *Rylands v. Fletcher*. See, too, *Slater v. Worthington's Cash Stores, Ltd.*, [1941] 1 K. B. 488, 492.

(t) None of the leading Abridgments down to Petersdorff includes it as a separate caption, and it appears as such only in the 1844 Supplement to Petersdorff, not in the main work.

(u) *Essays in Anglo-American Legal History*, iii, 506—507.

(a) Choke, J., in *Br. Abr. Trespass*, 310: "for this is the act of the wind, not of me".

(b) 11 Ex. 781.

(c) *Fardon v. Harcourt-Rivington* (1932), 146 L. T. 391, and *Jones v. L.C.C.* (1932), 48 T. L. R. 577, illustrate the same point with respect to inevitable accident.

it seems to be included in the definition of inevitable accident? §§ 16, 17.

An accident is inevitable if it is not avoidable by any such precaution as a reasonable man could be expected to take.

But what else is an act of God? The explanation of this *inelegantia* is partly supplied by Professor Wigmore. He shows that historically the two ideas tended to be confused (*supra*). But I think another reason is that the idea of exemption from liability for the catastrophes of nature (what we now call "acts of God") is much older, much simpler and much more easily grasped by primitive people than is the idea of inevitable accident. A falling tree, a flash of lightning, a tornado, or a flood, presents to the observer a simple and dramatic fact which the veriest child or layman would regard as an excuse for harm done, without further argument. Far from making the owner of the thing which did the damage liable, the tendency was to regard the catastrophe as a punishment for the sin of the injured person, as was the case with the eighteen Jews upon whom the Tower of Siloam fell, as narrated in the New Testament. But accidents which are not convulsions of nature are a very different matter. To know whether injury from a runaway horse was inevitable, one must ask, "Would a careful driver have let it run away?" And that is a question that may puzzle a lawyer, let alone a child or a primitive man. Hence arose the tendency to isolate act of God from the much more technical conception, inevitable accident. In a modern code, the former might well be merged in the latter (*d*). As it is, we must recognise that inevitable accident differs from act of God in (i) not depending on "natural forces"; (ii) being a general defence.

§ 17. Private defence.

Reasonable defence of oneself, of one's property, and of those whom one is bound to protect negatives any liability in tort. Some authorities regard it as a species of self-help, *i.e.*, as one of the remedies for tort (*e*). Certainly what begins as self-defence often ends as self-help, but the better view is

Private
defence.

(*d*) *Makin, Ltd. v. L. & N. E. Ry.*, [1913] K. B. 467, merely decided that "accident" in a particular Act of Parliament may include "act of God". In the French Code it is only roughly accurate to say that *force majeure* is equivalent to act of God, and a parallel between *cas fortuit* and inevitable accident would be even less accurate. Cf. *Matsoukis v. Priestman & Co.*, [1915] 1 K. B. 681, 686.

(*e*) Salmond, *Torts* (7th ed.), § 46; but Dr. Stallybrass impliedly prefers the other view: 10th ed., Chap. V. Clerk & Lindsell, *Torts*, 217.

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that private defence is allowed "not for the redress of injuries, but for their prevention" (f), and, as will be seen when we deal with self-help, much more injury may in certain circumstances be incidental to the expulsion of a trespasser than would ever be permissible in merely keeping him out.

Defence of person.

Defence of the person.—There is no doubt that the right extends to the protection of one's spouse and family, and the weight of opinion includes defence of the servant by the master, or *vice versa* (g). It has even been suggested that *any* one can be defended against unlawful force, and this seems sound in principle and is favoured by such scanty authority as there is (h).

It must always be a question of fact, rather than of law, whether violence done by way of self-protection is proportionate to warding off the harm which is threatened. On the one hand, I am certainly not bound to wait until a threatened blow falls before I hit in self-defence; thus my blow may be justified when my assailant does no more than shake his stick at me, uttering taunts at the same time (i); much less do I commit any assault by merely putting myself in a fighting attitude in order to defend myself (k). On the other hand, not every threat will justify a blow in self-defence; still less can B be excused "if upon a little blow given by A to B, B gives him a blow that maims him" (l).

Defence of property.

Defence of property.—Actual possession (whether with a good title or not), or the right to possession of property, is necessary to justify force in keeping out (or, for that matter, expelling) a trespasser. Thus, in *Holmes v. Bagge* (m), the plaintiff and defendant were both members of the committee of a cricket club. During a match in which the defendant was captain and the plaintiff was a spectator, the defendant asked the plaintiff to act as substitute for one of the eleven. He did so, but being annoyed at the tone of the defendant in commanding him to take off his coat, he refused either to

(f) Pollock, Torts, 147.

(g) Pollock, 134; Clerk & Lindsell, Torts, 217—218; and see Paston, J., in 1441, in Y. B. Pasch. 19 Hen. 6, f. 66, pl. 5.

(h) *Walter v. Jones* (1634), 2 Rolle Abr. 526 (C) 3. Cf. Salmond, Torts, § 90 (3).

(i) *Lule v. Wood* (1822), 7 Moore C. P. 33.

(k) Lord Lyndhurst, C.B., in *Moriarty v. Brooks* (1834), 6 C. & P. 684.

(l) *Cockcroft v. Smith* (1705), 2 Salk. 642.

(m) (1853), 1 E. & B. 782; see also *Dean v. Hogg* (1834), 10 Bing. 345, and *Roberts v. Tayler* (1845), 1 C. B. 117.

remove the garment or to leave the playing part of the field. He was then forcibly removed by the defendant's direction. The defendant, when sued for assault, pleaded possession of the ground, but the plea was held bad because possession was in the committee of the club. Note, however, that if the defendant had pleaded that he removed the plaintiff for disturbing persons lawfully playing a lawful game, he would probably have been justified.

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Protection of property may be:

(1) *Against animals*.—Most of the decisions relate to protection of game on the land, and the modern ones to criminal liability for malicious injury or cruelty to the trespassing animal; and it is not always safe to argue from these to civil liability. A test put forward in earlier cases was, "Was the harm inflicted really necessary?" (n). Thus, there is no liability in tort for injuries sustained by dogs running on dog-spears (forked pieces of pointed iron clamped horizontally to trees) whether the owner of the dog was notified of the danger or not (o). And it may be necessary to shoot a dog near an aviary of breeding pheasants in order to protect the birds (p). In *Cresswell v. Sirl* (q), where the defendant shot the plaintiff's dog, which was trespassing and attacking sheep and pigs, the Court of Appeal thought that the "necessity" test was too narrow, and they formulated the following rules: (1) the burden of proof is on the defendant to justify the shooting; (2) the defendant must prove, first, that the dog was either actually attacking the animals, or that, if it were left at large, it would renew the attack; secondly, either that there was no practicable mode, except shooting, of stopping the dog's present attack or preventing its renewal, or that the defendant, having regard to all the circumstances in which he found himself, acted reasonably in shooting. To shoot a dog merely because it is playing with another dog is unlawful (r); so, too, where it is merely chasing game not yet reduced into the possession of the person who owns the land,

(1) Against animals

(n) *Vere v. Cawdor* (1809), 11 East 568; approved by Lord Hewart, C.J., in *Barnard v. Evans*, [1925] 2 K. B. 794, 796—797.

(o) *Jordin v. Crump* (1841), 8 M. & W. 782; in *Deane v. Clayton* (1817), 7 Taunt. 489, the Court was evenly divided, and therefore no judgment was entered.

(p) *Miles v. Hutchings*, [1903] 2 K. B. 714.

(q) [1947] 2 A. E. R. 730.

(r) *Barnard v. Evans*, *supra*.

§ 17. or who has sporting rights over it (s). Indeed, the mere fleeting and harmless visits which dogs and cats pay to other people's premises are not trespasses at all in the sense that any damages are obtainable from their owners (t), though the occupier of land can of course expel them by reasonable means (u).

(2) Against persons

(2) *Against persons.*—The popular idea that a burglar may be shot at sight or that a trespasser must always take premises as he finds them goes beyond what the law allows. The broad test here, as elsewhere in private defence, is reasonableness. No one is bound to make his premises safe for trespassers and if burglars fall into saw-pits or if tramps are bitten by dogs, tossed by bulls or mauled by savage horses, they must put up with it (x). But there is a difference between harm suffered from what may be called the ordinary condition of premises and harm suffered from means of defence deliberately adopted. These means must be reasonable, i.e., proportionate to the injuries which they are likely to inflict. Such would be broken glass or spikes on a wall, or a fierce dog (y), but not deadly implements like spring-guns. The infliction of grave bodily harm is too high a price to demand for keeping one's property intact. Even at Common Law a trespasser wounded in this way could recover damages (a) unless he knew that the guns were somewhere on the land (b); it is now a misdemeanour to set any spring-gun, man-trap, or other engine likely to kill, or to inflict grievous bodily harm on any one; but the statute does not apply to the setting of such an implement between sunset and sunrise in a dwelling-house for its protection (c). Consistently with the principle of proportion in the means of defence, more latitude is permissible in protecting premises by night than in the day-time, or when

(s) *Gott v. Measures*, [1948] 1 K. B. 234.

(t) *Buckle v. Holmes*, [1926] 2 K. B. 125 (W. Cases, 226); post, § 150.

(u) Shooting tame pigeons, to preserve crops, after ineffectual warning to the owner, is probably lawful. *Taylor v. Newman* (1863), 4 B. & S. 89.

(x) *Lowery v. Walker*, [1910] 1 K. B. 173; reversed on another ground, [1911] A. C. 10; *Brock v. Copeland* (1794), 1 Esp. 203. W. O. Hart, "Injuries to Trespassers", 47 L. Q. R. 92—117.

(y) *Sarch v. Blackburn* (1830), 4 C. & P. 297. Query as to a fierce dog confined in a car left unattended on the highway? Scrutton, L.J., in *Sycamore v. Ley* (1932), 147 L. T. 342, 344.

(a) *Mrd v. Holbrook* (1828), 4 Bing. 628.

(b) *Hott v. Wilkes* (1820), 3 B. & Ald. 304.

(c) Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 31, re-enacting 7 & 8 Geo. 4, c. 18. Cf. *Wootton v. Dawkins* (1857), 5 W. R. 469.

the occupier is not in the presence of the trespasser than when he is. Thus an intruder who tears himself on a spiked wall has no ground of complaint, but he certainly would have one if he, being peaceable and unarmed, had a spike thrust into him by the occupier (d). "Presence [of the occupier] in its very nature is more or less protection . . . presence may supply means [of defence] and limit what it supplies" (e).

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Injury to innocent third person in private defence.— Suppose that in protecting myself from an unlawful attack by A, I injure you, an innocent passer-by, on what principles ought my liability to you to be discussed? Certainly not on those of private defence, for I cannot "defend" myself against one who has done me no unlawful harm. It would seem that the true principles applicable are inevitable accident if I did not intend the harm, and necessity (see § 18 below) if I did. This does not mean that whatever I may do is justifiable under the one head or the other. Provided I acted reasonably I am excused, and not otherwise.

Injury to
innocent
third person.

In *Scott v. Shepherd* (f), A threw a lighted squib into a crowded market-house. It fell upon the gingerbread stall of Yates. A bystander, Willis, to prevent injury to himself and the wares of Yates, instantly picked up the squib and threw it away. It fell upon the gingerbread stall of Ryal, who, to save his own goods from injury, threw the squib farther. It struck B in the face, exploded and blinded him in one eye. Now it was held without any difficulty, except as to the exact form of action, that A was liable to B for trespass and assault. No proceedings were taken against Willis or Ryal, but supposing that they had been sued by B, would they have been liable? Two of the Judges thought not, because they acted "under a compulsive necessity for their own safety and self-preservation" (g). No exact technicality was attached by the Judges to "necessity" or "self-preservation" and nothing that they said was inconsistent with basing (as a

(d) In *Pickwick Papers*, Captain Boldwig's mode of ejecting Mr. Pickwick whom he found asleep in a wheelbarrow in his grounds was excessive. He directed his gardener first to wheel Mr. Pickwick to the devil and then, on second thoughts, to wheel him to the village pound.

(e) *Per* Dallas, J., in *Deane v. Clayton* (1817), 7 Taunt. 469, 521. *Moulton v. Poulter*, [1930] 2 K. B. 183, is more appropriate to the rubric "Dangerous land and structures" than to "Private Defence". It is discussed *post*, § 166.

(f) (1773), 2 W. Bl. 892 (W. Cases, 177).

(g) *De Grey, C.J.*, at p. 900; *Gould, J.*, to the same effect, at p. 898.

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modern lawyer would prefer to do) their *dicta* on inevitable accident rather than on self-defence or necessity. A more serious difficulty is the question whether Willis and Ryal really did behave as reasonable men would have done. Willis, it will be noted, acted to prevent injury to himself as well as to the wares of Yates, and it must be recollected that a man may well act reasonably even if he shows no great presence of mind. A cooler man would have stopped the danger by putting his foot on the squib, but perhaps Willis did all that the lawyer, if not the moralist, could expect of him. Ryal, on the other hand, appears to have acted merely to preserve his goods, and we may doubt whether a man of ordinary presence of mind would throw a squib into a crowd to save his gingerbread from ruin.

Defence
against
"common
enemy".

The doctrine now under consideration has been applied to the protection of one's land against a "common enemy" like the sea or flood water. Where the incursion of the noxious substance is not due to the fault of anyone, such protection really falls under the defence of "necessity" (§ 18, *post*). A landowner may defend himself against the incursion by erecting barricades or heightening banks on his own land even if the foreseeable result is the flooding of his neighbour's land by the diverted water. The law allows a kind of reasonable selfishness in such matters (*h*). Altruism is not demanded: ordinary skill and care are (*i*). This applies not only to private landowners but also to any authority charged with protecting landowners from the incursion of water (*k*). Nor is it material that the barriers were erected at some distance within the boundaries of the land instead of on the edge of it; for it would be illogical to allow a landowner to protect the whole of his land against floods and yet to hold him liable because he had set his embankment farther back and so had left part of his land undefended: *Gerrard v. Crowe* (*l*).

But this repulsion of a temporary incursion must be distinguished from accumulating water on one's land and then getting rid of it by artificial means in such a way as to flood a neighbour's land. That is not lawful (*m*). And this is so

(*h*) *Nield v. L. & N. W. Ry.* (1874), L. R. 10 Ex. 4, 7.

(*i*) *Murex Drainage Board v. G. N. Ry.* (1912), 106 L. T. 429.

(*k*) *R. v. Pagham* (1828), 8 B. & C. 356.

(*l*) [1921] 1 A. C. 395, 400.

(*m*) *Hurdman v. N. E. Ry.* (1878), 3 C. P. D. 168. Distinguished in *Marex Drainage Board v. G. N. Ry.* (1912), 106 L. T. 429, 430, on the

even if the accumulation of the water is due, not to the act of the landowner, but to an extraordinary rainfall. Thus, in *Whalley v. Lancashire and Yorkshire Ry.* (n), an unprecedented storm and rainfall flooded the drains bordering on the railway embankment of the defendants so that a large quantity of water was dammed up against the embankment. The water afterwards rose so as to endanger the embankment. The defendants then pierced it with gullies and the water flowed away and flooded the plaintiff's land. The defendants were held liable, although the jury found that if they had had only the preservation of their own land to consider, their act would have been reasonable. They could lawfully have turned away the flood if they had seen it coming, but "there is a difference between protecting yourself from an injury which is not yet suffered by you, and getting rid of the consequences of an injury which has occurred to you" (o). The distinction between this case and *Gerrard v. Crowe* (supra) appears to be somewhat fine, but in *Whalley's Case* the facts indicate that, however sudden the influx of the water may have been, some little time elapsed after it and before the flood formed, and, in that sense, there was an "accumulation".

Greyvensteyn v. Hattingh (p), an appeal case from South Africa, related to a plague of locusts. They entered the plaintiff's land, and the defendants, in the reasonable belief that they were trekking towards their land, entered a strip of land belonging to third parties and turned away the locusts so that they re-entered the plaintiff's land and devoured his crops. The defendants were held not liable either because they were repelling an extraordinary misfortune or because, if locusts were to be regarded in South Africa as a normal incident of agriculture, the defendants were entitled to get rid of them just as they would be allowed to scare away crows regardless of the direction they took in leaving (q).

ground that defendants in *Hurdman's Case* had not used due care in discharging a statutory duty; and in *Gerrard v. Crowe*, [1921] 1 A. C. 395, 400, on the ground that defendants' artificial erection in *Hurdman's Case* caught the rain naturally and ordinarily falling and discharged it on neighbouring land.

(n) (1884), 13 Q. B. D. 131.

(o) Lindley, L.J., at p. 140.

(p) [1911] A. C. 355.

(q) Scaring crows is a normal incident in the occupation of land; piercing a railway embankment is not an ordinary use of the embankment: 13 Q. B. D. at p. 138.

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Necessity.

§ 18. Necessity.

This negatives liability in tort, though the authority on it is scanty (r). It differs from private defence in that in necessity the harm inflicted on the plaintiff was not provoked by any actual or threatened illegal wrong on the plaintiff's part and that what the defendant did may be entirely for the good of other people and not necessarily for the protection of himself or his property. It differs from inevitable accident in that in necessity the harm is intended. Its basis is a mixture of charity, the maintenance of the public good and self-protection.

Common examples are pulling down a house on fire to prevent its spread to other property (s), destroying a building made ruinous by fire to prevent its collapse into the highway (t), throwing goods overboard to lighten a ship in a storm (u), and assistance, medical or otherwise, rendered to a person unconscious at the time (a). So, too, the removal of

(r) Pollock, Torts, 132—134. For "agency of necessity", see *Sachs v. Miklos*, [1918] 1 A. E. R. 67.

(s) *Shelley arguendo* in Y. B. Trin. 13 Hen. 8, f. 15, pl. 1, at fol. 16a; *Kingsmill, J.*, in Y. B. Trin. 21 Hen. 7, f. 27b, pl. 5; *Saltpetre Case* (1606), 12 Rep. 12. 13. But officious interference with a fire brigade which is adequately coping with the fire is not justified: *Carter v. Thomas*, [1893] 1 Q. B. 673.

(t) *Dewey v. White* (1827), M. & M. 56 (A, whose adjoining house was inevitably damaged, had no remedy).

(u) *Mouse's Case* (1609), 12 Rep. 63.

(a) Another example given in text-books is the right of a passenger on the highway to deviate from it, if it is foundrous, and to go upon the adjoining land: Salmond, Torts § 6 (5); Pollock, Torts, 312. But this needs qualification. No doubt, if the neighbouring landowner is bound to repair the highway and has neglected to do so, or if he has placed an obstruction upon it, deviation by passengers on to his land is permissible provided that this is the only reasonable mode of progress in the circumstances, and that no further penetration is made into his land than is necessary: *Glen. Highways* (2nd ed., 1897), 69—71; *Pratt & Mackenzie, Highways* (18th ed., 1932), 81—82; *Absor v. French* (1678), 2 Show. 28; *Dawes v. Hawkins* (1660), 8 C. B. (N.S.) 848, 854, 856; *Willes, J.*, in *R. v. Oldrege* (1868), 32 J. P. 271; *Arnold v. Holbrook* (1873), L. R. 8 Q. B. 76. But the deviation in such circumstances seems to be a mode of self-help (i.e., a remedy) rather than necessity, which is a negation of liability on the actor's part. Whether there is any right to deviate beyond this is very uncertain. There are dicta in the cases and broad statements in the text-books which indicate that deviation may be over any adjacent landowner's property: Blackstone, Comm. n, 36; 2 Wms. Saunders (ed. 1871), 462, 463 (notes to *R. v. Stoughton*). I think that, on principle, in extreme cases such deviation might be justified on the ground of necessity, even when the adjacent owner is not at fault; e.g., if an explosion on an arterial road completely blocks the traffic and there is no other road in the neighbourhood to which traffic can be reasonably diverted. Cf. American Restatement of the Law of Torts, vol. 1, § 195 of which allows reasonable deviation to any traveller who reasonably believes that the highway is impassable: nor is he bound to make restitution for the harm: Restatement of Restitution, § 122. The rules are all the clearer there because bad roads are much

the plaintiff's barge because it is frozen hard to the defendant's barge which he is lawfully moving (b). The measures which are taken must be reasonable. In *Kirk v. Gregory* (c), X died in a state of *delirium tremens*. His servants were feasting and drinking in the house. X's sister-in-law removed X's jewellery from the room where he lay dead to another room for safety's sake. Some unknown person stole it. The sister-in-law was held liable to X's executor for trespass to the jewellery, because there was no proof that her interference was reasonably necessary. On the other hand, the justification for interference depends upon the state of things at the moment at which interference takes place. Subsequent events may show that interference was not needed at all, but that will not deprive the doer of his defence. In *Cope v. Sharpe* (d), a fire broke out on A's land. While A's servants were trying to beat it out, the gamekeeper of C (who had shooting rights over A's land) set fire to some strips of heather between the fire and some nesting pheasants of C. Shortly afterwards, A's servants succeeded in extinguishing the fire. A sued the gamekeeper for trespass. He was held not liable, for there was real and imminent danger to the game at the moment at which he acted, and what he did was reasonably necessary.

So far we have been dealing with harm inflicted on property. There is no reported decision that is of any real assistance on necessity as a defence for inflicting injuries to the person. The dicta in *Scott v. Shepherd* (e) considered in § 17 (*ante*) were only *obiter*. In *Gregson v. Gilbert* (f), where fifty negro slaves were thrown overboard owing to shortage of water, it was held in an action upon a policy of insurance for the value of the slaves that, upon the facts, no sufficient evidence of necessity had been shown for the captain's act, but the decision is obviously of little value for modern purposes. All that it is safe to hazard is that the principle of reasonableness applies here also, that more latitude would be allowed in the protection of the actor's person than of his

commoner in some parts of America than they are here, and the problem thus arises more frequently

(b) *Milman v. Dolwell* (1810), 2 Camp 378. Defendant lost his case because he did not plead necessity.

(c) (1876), 1 Ex. D. 55.

(d) [1912] 1 K. B. 496.

(e) (1773), 2 W. Bl 892

(f) (1783), 3 Doug! 232.

§ 18. property, and still more where he acts for the public safety and not for his own (g).

Is compensation
demandable?

Another point not free from doubt is whether, assuming that the defence of necessity has been established, the defendant must make compensation or at least restitution for the harm which he has inflicted. In some American States he must do so and there is much to be said in favour of this, where he acted merely in protection of himself or his property (h). In English law, it seems clear that no damages can be claimed in tort where the defendant's act is justified by necessity (i), but that does not settle the question whether the defendant is liable to make restitution, i.e., to restore to its former condition the property of the plaintiff which has been affected by the defendant's act, or, if restoration be impossible, to pay the plaintiff equivalent compensation. Here, the basis of the plaintiff's claim would be quasi-contract, not tort, the practical difference being that compensation payable on a quasi-contractual claim may be considerably less than damages on a claim in tort. Perhaps a distinction exists between (1) an act done for the common weal, and (2) an act done simply in protection of one's person or property. As to (1), in the *Saltpetre Case* (k), it was said that every man, as well as the King and his officials, may, for the defence of the realm, enter upon another man's land and make trenches or bulwarks there; "but after the danger is over, the trenches and bulwarks ought to be removed, so that the owner shall not have prejudice in his inheritance". Whether the words between quotation marks apply to the King and his officials is uncertain and has been greatly disputed; certainly the Crown must pay compensation if land is taken for administrative purposes (l) and possibly even if it is taken for military purposes (m). Notwithstanding the *dictum* in the *Saltpetre*

(g) The driver of a fire engine is in no privileged position; he must observe traffic signals: *Ward v. L.C.C.*, [1938] 2 A. E. R. 341.

(h) Professor F. H. Bohlen in 39 *Harvard Law Review*, 307—324.

(i) *Cope v. Sharpe*, [1912] 1 K. B. 496. Tindal, C.J., in *Anthony v. Haney* (1832), 8 Bing. 186, 192—193, said *obiter* that an owner who peaceably retakes his goods from the land of another, who refuses to give them up, must pay for such damage as he commits. But this relates to the limits of self-help rather than to necessity. Cf. Salmond, *Torts*, § 6 (5), and § 44, note (p).

(k) (1606), 12 Rep. 12, 13.

(l) *Att.-Gen. v. De Keyser's Hotel, Ltd.*, [1920] A. C. 508.

(m) *Contra, Re a Petition of Right*, [1915] 3 K. B. 649, but the decision was much shaken in *Att.-Gen. v. De Keyser's Hotel* (*supra*), and it was based upon the Crown's prerogative which, scientifically, is distinct from

Case it may be doubted whether even in the time of Coke, §§ 18, 19. who reported the case, a private person need make any compensation for acts justifiably done in defence of the realm (n). As to (2), it is suggested that bare restitution or compensation for the use or consumption of property might be claimed on quasi-contractual grounds: e.g., using a neighbour's fire extinguisher to put out a fire in one's own house (o).

Duress, or threatened injury to a person unless he commits a tort, appears to be no defence if he does commit it. In *Gilbert v. Stone* (p), twelve unknown armed men threatened to kill the defendant unless he entered the plaintiff's house with them, which he did. To an action for trespass he was held to have no defence, "for one cannot justify a trespass upon another for fear, and the defendant hath remedy against those that compelled him". But actual physical compulsion, as distinct from mere threat of it, is a defence (q). Duress.

§ 19. Statutory authority.

Statutory
authority.

When a statute authorises the commission of what would otherwise be a tort, then the party injured has no remedy apart from the compensation (if any) which the statute allows him. This principle, of course, applies to any tort, but it is most commonly illustrated in the tort of nuisance. Statutory powers are not, however, charters of immunity for any injurious act done in the exercise of them. In the first place, Courts will not impute to the Legislature any intention to take away the private rights of individuals without compensation,

necessity as a defence to tort. No petition of right is traceable in which the subject sought compensation from the Crown for taking his lands even for warlike purposes, but whether this was because no subject ever had the temerity to make such a claim or because the Crown never gave him occasion to do so is unknown: [1920] A. C. at p. 563. The law as to compensation during the World War, 1939-1945, is embodied in legislation conveniently accessible in Butterworth's *Emergency Legislation Service*.

(n) The whole passage in 12 Rep. 12-13 is rather confused and the earlier authorities do not support Coke; e.g., *Maleverer v. Spinke* (1538), Dyer, 35b, 36b, para. 40.

(o) There is no English decision in point, but an example put by Lord Mansfield in *Hamblly v. Trott* (1776), 1 Cowp. 371, 375, is consistent with the suggestion. The American Restatement of Restitution, § 122, is to the like effect and applies the rule also where A harms B's property in order to preserve C or C's property, for "a person is not entitled to be a good Samaritan at the expense of another". S. 122, however, exempts A from any obligation to make restitution to B if A's act appeared reasonably necessary to avert a public catastrophe.

(p) (1647), Aleyn 35.

(q) *Smith v. Stone* (1647), Style 65; dictum in *Weaver v. Ward* (1616), Hob. 184.

§ 19.

unless it be proved that there was such an intention; and the burden of proving it is on those who exercise the statutory powers (r). Next, when the Legislature confers such powers, it may do so in one of two ways:

(i) It may, in effect, order a particular thing to be done regardless of whether it inflicts an injury upon another person. Then the authority covers not only harm which must obviously occur, but also that which is necessarily incidental to the exercise of the authority. It is impossible to build a railway without interfering with private land. But it is equally impossible to run trains on it without some noise and vibration, and there is no more a remedy for this incidental harm provided the work has been carried out without negligence, than there is for the more obvious harm (s). Compensation may be allowed by the statute, but that is all that is obtainable.

(ii) It may permit a particular thing to be done, provided it can be done without interfering with private rights. Thus, in *Metropolitan Asylum District v. Hill* (t) it was held that a smallpox hospital was a nuisance because, although the statute enabled the managers of the district to purchase land and to erect buildings on it for the care of the sick and the infirm poor, yet it conferred this power only subject to the managers obtaining by free bargain and contract the means of doing so; much less did it condone the commission of any nuisance by them. With this case may be compared *Att.-Gen. v. Nottingham Corporation* (u). There the corporation proposed to use a building as a smallpox hospital, and the Court declined to issue a *quia timet* injunction to prevent them from doing so, because they did not regard the theory of the aerial dissemination of smallpox as unequivocally established.

The distinction between the cases seems to be this. The argument of the managers in *Hill's Case* was, "Because we

(r) *Farnworth v. Manchester Corporation*, [1929] 1 K. B. 533, 556. The principles as to statutory authority are well stated by various members of the C. A. in this case: see pp. 546, 558, 562, 579. There were differences of opinion as to the application of the principles to the particular facts both here and in the House of Lords: *Manchester Corporation v. Farnworth*, [1930] A. C. 171.

(s) Lord Sumner, in *Quebec Ry., etc. v. Vandry*, [1920] A. C. 662, 679, 680; cited in *Farnworth's Case*, [1929] 1 K. B. at p. 546.

(t) (1881), 6 App. Cas. 193. Lord Selborne L.J., at p. 201.

(u) [1904] 1 Ch. 673. See, too, *Edgington v. Swindon Corporation*, [1899] 1 K. B. 86; *East Suffolk, etc. Board v. Kent*, [1941] A. C. 74.

have authority to erect a smallpox hospital, we can erect it *anywhere*". The argument of the plaintiff in *Att.-Gen. v. Nottingham Corporation* was, in effect, "You cannot erect a smallpox hospital *anywhere* in a populous neighbourhood". In fact, both arguments were over-statements, for the first would have twisted the statute into a licence to commit any nuisance by means of the hospital, while the second assumed the hospital to be a nuisance without any proof that it was. In fact, with smallpox hospitals, as with every other kind of potential nuisance, it is a question of time, place and circumstance whether there is an actual nuisance or not (a).

§§ 19, 20.

§ 20. Motive and Malice.

Motive may be conveniently treated here. It signifies the reason for conduct. Unfortunately it has become entangled with the word "malice" which is used in two quite different senses in the law of tort. It may mean what the layman usually takes it to be,—“evil motive”; or it may signify doing an act wilfully without just cause or excuse (b). This latter meaning has really nothing to do with motive but refers to intention, a term which ought to be confined to advertence to conduct and its desired consequences, and which is quite colourless as to the motive which influences the actor; we are not concerned with it here.

Motive and malice.

As to motive in its proper meaning, the general rule is that, if conduct is presumptively unlawful, a good motive will not exonerate the defendant, and that, if conduct is lawful apart from motive, a bad motive will not make him liable.

Motive generally irrelevant.

We shall see that there are several exceptions to the second part of this rule. To the first part of it defences like necessity and private defence are exceptions, for they depend to a certain extent on a good motive on the part of the defendant.

The general irrelevancy of evil motive was affirmed by the House of Lords in *Bradford Corporation v. Pickles* (c).

(a) For the rules as to notice of action in this branch of the law, see Clerk & Lindsell, Torts, Ch. V. See, generally, for "statutory authority", Pollock, Torts, 101—106; Salmond, Torts, § 9; Friedmann, 8 Modern Law Review, 31—49.

(b) Bayley, J., in *Bromage v. Prosser* (1825), 4 B. & C. 247, 255; Bowen, L.J., in *Mogul Steamship Co., Ltd. v. McGregor, Gow & Co.* (1889), 23 Q. B. D. 598, 612; Lord Watson, in *Allen v. Flood*, [1898] A. C. 1, 94. In earlier times one of the meanings of malice was "harmfulness" quite independently of any human mental element. *E.g.*, in Paynel, Salerne's Regim. (a book on health A.D. 1528), "Such wyne doth alay the malice of ye meate".

(c) [1895] A. C. 587.

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Pickles was annoyed at the refusal of the Corporation of Bradford to purchase his land in connexion with the scheme of water supply for the inhabitants of the town. In revenge, he sank a shaft on his land. The water which percolated through his land in unknown and undefined channels from the land of the corporation on a higher level was consequently discoloured and diminished when it passed again to the lower land of the corporation. For this injury Pickles was held not liable. "It is the act," said Lord Macnaghten, "not the motive for the act that must be regarded. If the act, apart from motive, gives rise merely to damage without legal injury, the motive, however reprehensible it may be, will not supply that element" (d). Three years later this rule was again emphasised by the House of Lords in *Allen v. Flood* (e).

Criticisms of
the rule.

Such is the law and, as a learned writer has said of it, "there is a kind of hinterland to our law of torts where the King's writ does not run—a veritable legal Alsatia—in which greed, envy and spitefulness are permitted to reign supreme" (f). In this point English law is unsatisfactory and lags behind that of several European States and of some jurisdictions in the United States of America (g). "Abuse of rights" has received a good deal of attention in these other systems, but with us there is nothing to prevent a man from capriciously setting fire to his own corn-field, blocking up his neighbour's prospect by a "spite" fence, or indulging in any other act of senseless spleen or prodigality which does not happen to fall within some definite tort or crime. If one may venture to suggest lines upon which the law might be amended, I think that at the outset a distinction must be drawn between abuse of private rights which directly injures the public in general but no one in particular (e.g., setting fire to a corn-field or oil-well), and abuse of a right which primarily injures one's neighbour (e.g., Mr. Pickles' conduct). The first kind ought to fall within the sphere of criminal law, the second within the law of tort (h). As to the first, the

(d) [1895] A. C. at p. 601.

(e) [1898] A. C. 1.

(f) Professor H. C. Gutteridge, in 5 Cambridge Law Journal (1933), 31.

(g) Gutteridge, *op. cit.*, 22—45; C. K. Allen, *Legal Duties* (1931), 95—116; J. B. Ames, in *Selected Essays on the Law of Torts* (1924), 150—161; O. W. Holmes, *ibid.*, 162—175; Professor Roscoe Pound, *Spirit of the Common Law* (1921), 202—203.

(h) The same act may fall under both heads, but that would not alter the necessity for treating it separately under each: e.g., if A allows natural

Legislature might, if need arose, make a catalogue of things of public economic value such as corn and petroleum and make capricious waste of them a criminal offence; but such waste is not likely to be common enough to make any legislation necessary. As to the second class, it might be enacted that where an injury is inflicted on another person solely from an evil motive and such injury is not already within the list of "malicious" torts (see below), the offender should be liable in tort. There is doubtless some risk of undue interference with individual liberty in either of these suggested reforms, but the Courts could be trusted to see that they should not unduly prejudice the freedom of the subject (i).

In the following exceptional cases evil motive is relevant in the law of tort. Exceptions to the rule.

- (i) Malicious prosecution (*post*, § 175).
- (ii) Defamation, where qualified privilege or fair comment is pleaded as a defence (*post*, §§ 84, 88).
- (iii) Slander of title (*post*, § 170).
- (iv) Conspiracy (*post*, Ch. XVII).
- (v) Nuisance; there is, however, some doubt as to this, which will be discussed in the chapter on Nuisance (*post*, § 133).
- (vi) Probably where A threatens B in a manner obnoxious to the principle laid down in *Thorne v. Motor Trade Association* (*post*, § 169).
- (vii) By the Public Authorities Protection Act, 1893 (56 & 57 Vict. c. 61), lapse of six months (one year under the Limitation Act, 1939) bars any action against any person acting in pursuance of an Act of Parliament or of a public duty or authority. It is possible that this period of limitation applies only where the act was done with an honest motive (k).
- (viii) Evil motive may aggravate damages. ;

gas which percolates through the looseness of the soil from B's land to his own, to waste itself in the air: *Hague v. Wheeler* (1893), 157 Pennsylvania State Rep. 324.

(i) Professor Gutteridge, 5 Cambridge Law Journal, 43—45, thinks that it would be unsafe to go beyond forbidding abuse of a proprietary right from a wholly improper motive. But it seems hard to distinguish exactly a proprietary right. Moreover, German law appears to find little difficulty in working such articles of the Civil Code (138, 226, 826) as deal in very general terms with wrongs of this sort.

(k) *Scammell & Nephew, Ltd. v. Hurley*, [1929] 1 K. B. 419, 427—428; *per* Scrutton, L.J.

§ 21. § 21. Remoteness of consequence (or damage).

Remoteness
of conse-
quence.

Even if the plaintiff proves every other element in tortious liability, he will lose his action if the harm which he has suffered is too remote a consequence of the defendant's conduct, or, as it is somewhat loosely said, if the damage is too remote.

A question to
some extent
unscientific

Theoretically the consequences of any conduct may be endless, but a lawyer must draw the line somewhere (l). Bacon's rendering of the maxim, "In jure non remota causa sed proxima spectatur" has often been cited. "It were infinite for the law to consider the causes of causes, and their impulses one of another: therefore it contenteth itself with the immediate cause, and judgeth of acts by that without looking to any further degree" (m). Of course this does not tell us what is an "immediate" cause, and we shall see that the Common Law has probed the matter more deeply than the maxim does. But any student who expects a scientific analysis of causation will be grievously disappointed. Up to a certain point the Common Law does touch upon metaphysics. But no test of remoteness of causation put forward by Anglo-American Courts would satisfy any metaphysician. On the other hand, no test suggested by metaphysicians would be of any practical use to lawyers. The rather unscientific way in which lawyers are apt to approach the problem is shown in their use of metaphors about causation, such as chains, rivers, transmission gears, conduit pipes, nets, insulators (n), or phrases expressive of it, such as "*causa causans* and *causa sine qua non*", "direct cause and intervening cause", "effective cause and ineffective cause", "*nova causa interveniens*"; but all these merely conceal the puzzle and do not solve it. In fact, neither metaphor nor catch-word will release Judges (and it is the Judge, not the jury, who decides whether consequences are too remote) from the effort or agony of deciding each case on its merits with such help as they can

(l) A Frenchman, in celebrating the restoration of Alsace to France in 1919, fired a revolver which burst and injured him. His claim that his injuries were due to the outbreak of war in 1914 was rejected by the Metz Pensions Board as too remote: Times Newspaper, Feb. 6, 1933. For German law, see 50 L. Q. R. 512-531.

(m) *Maxims of the Law* (1630), Reg. 1. For other views of Bacon's meaning, see Professor J. H. Beale in *Selected Essays in the Law of Torts* (1924), 730 *seq.*, and Professor J. A. McLaughlin in 39 *Harvard Law Review* (1925-1926), 156, note 30; and for some criticisms of Bacon, see Jeremiah Smith, *ibid.* 652-654.

(n) A. L. Goodhart, *Essays in Jurisprudence* (1931), 131, note 8.

get from some very general principles. This may not be systematic, but what is often forgotten by critics is that the Judges would do no better if they tried to be more exact. For, as Lord Sumner said, "The object of a civil inquiry into cause and consequence is to fix liability on some responsible person and to give reparation for damage done . . . The trial of an action for damage is not a scientific inquest into a mixed sequence of phenomena, or of an historical investigation of the chapter of events . . . It is a practical inquiry" (o).

Such principles as we have are no earlier than the nineteenth century (p). Until then no one seems to have made use of Bacon's maxim (q), and the Courts either took refuge in scraps of scholastic logic about "*causa causans*" and "*causa causata*" (r), or indulged in the mistiest generalities, such as, "he that does the first wrong shall answer for all consequential damages" (s), or "the damages must be the legal and natural consequence" (t) of the wrongful act. Then the phrase "*natural and proximate consequence*" creeps in (u). "Proximate" was a misplaced adjective, for it suggested that the event which occurs immediately before the harm suffered by the plaintiff is always to be selected by the law as the determinant cause of that harm. But that is not necessarily so. If A throws a lighted squib into a crowd and it falls upon B who, in alarm, at once throws it away and it falls upon C, who does the like, and the squib ends its journey by falling upon D, exploding and putting out his eye, here A's act is held to be the proximate cause of the damage, though in fact it was the act farthest from the damage, not the one nearest to it (a).

In 1850 were laid the seeds of a controversy which was supposed to have been settled in 1921, but which cannot be regarded as disposed of even now. Between these two dates,

(o) *Weld-Blundell v. Stephens*, [1920] A. C. at p. 986. See, too, Goddard, L.J., in *Durcan v. Cammell, Laird, Ltd* (1944), 171 L. T. 186, 199, quoting Lord Wright in *Liesbosch Dredger v. Edison S.S.*, [1933] A. C. 449, 460.

(p) Two important American studies on the topic are in *Selected Essays on the Law of Torts* (1924), 649—730 (Jeremiah Smith), 730—755 (Professor Joseph H. Beale).

(q) Beale, *op. cit.*, 732.

(r) *Earl of Shrewsbury's Case* (1610), 9 Rep. 46, 50b.

(s) *Roswell v. Prior* (1700), 12 Mod. 636, 639, *Scott v. Shepherd* (1773), 2 W. Bl. 892, 898, 899.

(t) *Vicars v. Wilcocks* (1806), 8 East 1, 3.

(u) *E.g.*, *Ward v. Weeks* (1830), 7 Bing. 211, 212.

(a) *Scott v. Shepherd* (1773), 2 W. Bl. 892 (W. Cases, 17).

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two different views prevailed as to the test of the remoteness of consequence. Both were described by a great variety of phrases; Sir Samuel Evans collected no less than eight of them in *The London* and they were only specimens (b).

(1) The test of reasonable foresight

(1) According to the first view *consequences are too remote if a reasonable man would not have foreseen them*. Such was the opinion of Pollock, C.B., in two cases in the Court of Exchequer, 1850—*Rigby v. Hewitt* (e) and *Greenland v. Chaplin* (d). He admitted that he spoke only for himself and not for his judicial brethren, but in some later decisions his opinion was followed (e).

(2) The test of directness

(2) The second view is that if a reasonable man would have foreseen *any* damage as likely to result from his act, then he is liable for all direct consequences of it, whether a reasonable man would have foreseen them or not.

To put it in another way, reasonable foresight is relevant to the question, "Was there any legal duty on the defendant to take care?" It is irrelevant to the question, "If the defendant broke a legal duty, was the consequence of this breach too remote?" What ought to have been reasonably anticipated "goes to culpability, not to compensation" (f).

The authority for this second view began with *Smith v. L. & S. W. Ry.* (1870) (g). In a very dry summer, the railway company's servants cut the grass and trimmed the hedges bordering the railway line. They left the trimmings and cuttings in heaps between the line and the hedge for a fortnight. A fire, caused (as the jury found) by sparks from a railway engine, ignited these heaps, and spread to a stubble-field beyond the hedge. Thence a high wind carried it across a road to the plaintiff's cottage, situated 200 yards from the spot where the fire began. The cottage was burned. The Court of Exchequer Chamber held the company liable (h). Blackburn, J., said: "What the defendants might reasonably

(b) [1914] P 72 77-78 See Lord Sumner's criticism of some of them in [1920] A C at pp 983-984

(c) 5 Ex 240, 213 19 L J Ex 291 292

(d) 5 Ex 243 248 19 L J Ex 293, 295

(e) *L. g.* Lord Wensleydale, in *Lynch v. Knight* (1861), 9 H L C 577 600, Vaughan Williams, L J in *Cory v. France*, [1911] 1 K B 114, 122

(f) Lord Sumner in *Weld Blundell v. Stephens*, [1920] A C at p 984

(g) L R 6 C P 14 The late T. Beven relied strongly upon this case. Negligence in Law (4th ed 1928) 1, 89-92

(h) The question really before the Court was, "Were the defendants negligent at all?" but some of the Judges also considered the question "Were the damages too remote?"

anticipate is . . . only material with reference to the question whether the defendants were negligent or not, and cannot alter their liability if they were guilty of negligence" (i). Now they might, in the circumstances, have reasonably anticipated some sort of fire breaking out. Therefore that put them under a legal duty to provide against such an outbreak. They did not do so. They broke their duty. Therefore they were liable for the consequence which ensued even though a reasonable man would not have foreseen that particular consequence.

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Smith v. L. & S. W. Ry. was followed in some *dicta* in later cases (k), and was adopted in 1921 by the Court of Appeal in *Re Polemis and Furness, Withy & Co., Ltd.* (l). In that case a ship was hired under a charter which excepted both the shipowner and the charterers from liability for fire. Among other cargo the charterers loaded a quantity of benzine and/or petrol in tins. During the voyage the tins leaked and thus there was a good deal of petrol vapour in the hold. At a port of call, stevedores, who were the servants of the charterers, negligently let a plank drop into the hold while they were shifting the cargo. A rush of flames at once followed and the ship was totally destroyed. The charterers were held liable for the loss—nearly £200,000. The fire exception clause did not help them, because there was no express statement that it covered negligence on the part of servants. And, as the fall of the plank was due to servants for whom they were responsible, the charterers were liable for all direct consequences of the negligence, even though they could not have been reasonably anticipated. None of the Court except Scrutton, L.J., defined "direct" consequence. He said that damage is indirect if it is "due to the operation of independent causes having no connexion with the negligent act, except that they could not avoid its results" (m).

Re Polemis therefore pronounced in favour of the second rule and, although the case itself related to negligence in particular, its principle apparently extended to all torts. But

Has the test of directness been fully accepted?

(i) L. R. 6 C. P. at p. 21.

(k) Evans, P., in *H.M.S. London*, [1914] P. 72, 78. Lord Sumner, in *Weld-Blundell v. Stephens*, [1920] A. C. 956, 984.

(l) [1921] 3 K. B. 560, 27 Com. Cas. 25 (W. Cases, 19). For report in Court below, see 26 Com. Cas. 281: for pleadings, see 4 Cambridge Law Journal (1931), 125—145.

(m) [1921] 3 K. B. at p. 577 See, also, Salmond, *Torts*, § 34 (7), (17).

§ 21. in the years which have succeeded it some doubts as to its scope have arisen. At first, it seemed to have laid down a rule which, whether the legal profession liked it or not, was definitely the law unless and until the House of Lords held otherwise. Yet as time went on it became evident that writers of text-books and articles attached more importance to it than did counsel and Judges. Of the writers, some approved the principle (n), some disliked its inconsistency with earlier decisions (o), some thought that it raised many difficulties (p), some disliked it in any event (q), and some were puzzled at its relation to remoteness of damage for breach of contract (r). But none of them denied it to be law, and every one of them at least did it the honour of noticing it. With practitioners and the Courts, however, it was otherwise. They did not criticise it; they simply ignored it. Until 1933 there is scarcely any mention of it in the reports (s). Moreover, some of the Judges showed a tendency to tackle the question of remoteness in terms that were perilously near the old reasonable foreseeability test, for they spoke of consequences as being, or not being, "natural and probable".

The
Liesbosch.

Then in 1933 *Re Polemis* attracted the attention of the House of Lords and, without any detailed consideration of it (for that was not necessary in the circumstances), they

(n) Mr. S. L. Porter, K.C. (now Lord Porter), in 5 Cambridge Law Journal (1933), 176—191; Professor J. A. McLaughlin in 33 Harvard Law Review (1925—1926), 163, note 53. Cf. Cleik & Lindsell, Torts, 185 *seq*.

(o) The learned editor of Mayne, Damages (10th ed., 1927), 44; but he thinks that it does much to clarify the law.

(p) Sir Frederick Pollock, Torts, 28—30 (and 45—46 for the learned editor's view), and in 38 Law Quarterly Review (1922), 165—167. See, too, Salmond, Torts, § 34.

(q) Professor A. L. Goodhart reprobrates it as unscientific: Essays, 118, 129.

(r) *Post*, § 191. The point was first raised and (I thought) settled in Salmond & Winfield, Contracts (1927), 506—507, but the chase was renewed by Sir Frederick Pollock in Torts (18th ed., Pref. vii, and pp. 37—39), by Dr. A. D. McNair in 4 Cambridge Law Journal, 125—145, by Mr. Porter (now Lord Porter) in 5 Cambridge Law Journal (1934), 176—191. It has passed over the border to Scotland (Gloag, Law of Contract (2nd ed., 1929), 687, note 1), and has crossed the ocean to Canada (9 Canadian Bar Review (1931), 514—520). All I wish to add here is a protest against the persistent misstatement that I regard *Re Polemis* as in conflict with *Hadley v. Baxendale*. A bare reference to Salmond & Winfield, *op. cit.*, will show that I believe the cases to be reconcilable in spite of apparent conflict.

(s) Lord Sumner, in *Weld-Blundell v. Stephens*, [1920] A. C. 956, 984 (a case on contract), had pretty nearly anticipated it. Atkin, L.J., applied it in *Hambrook v. Stokes*, [1925] 1 K. B. 141. Lord Phillimore, in *G. W. Ry. v. S.S. Mostyn*, [1928] A. C. at p. 91, made an almost colourless reference to it in an *obiter dictum*. See, too, Scrutton, L.J., in *Compania Mexicana, etc. v. Essex Transport Co.* (1929), 141 L. T. 106, 108—109.

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put an interpretation upon it which limits its scope. The case before them was *Liesbosch Dredger v. Edison S.S.* (t). By negligent navigation, the *Edison* fouled and sank the dredger *Liesbosch* whose owners were under a contract with a third party to complete a piece of work within a given time. They were put to much greater expense in fulfilling this contract because they were too poor to buy a substitute for the dredger. They sued the owners of the *Edison* for negligence. The House of Lords held that they could recover as damages the market price of a dredger comparable to the *Liesbosch* and compensation for loss in carrying out the contract between the sinking of the *Liesbosch* and the date on which the substituted dredger could reasonably have been available for work, for the measure of damages in such cases is the value of the ship to her owner as a going concern at the time and place of the loss, and, in assessing that value, regard must naturally be paid to her pending engagements (u); but the claim for extra expenses due to poverty was rejected, because the plaintiffs' want of means was an extraneous matter which rendered this special loss too remote. Lord Wright (with whose speech the rest of the House concurred) distinguished *Re Polemis* on the ground that there the injuries suffered were "the immediate physical consequences of the negligent act", and he added, "Nor is the appellants' financial disability to be compared with that physical delicacy or weakness which may aggravate the damage in the case of personal injuries, or with the possibility that the injured man in such a case may be either a poor labourer or a highly paid professional man. The former class of circumstances goes to the extent of actual physical damage and the latter consideration goes to interference with profit-earning capacity; whereas the appellants' want of means was, as already stated, extrinsic" (x).

The decision is not entirely free from difficulties. In the first place, "immediate" as applied to "consequences" is open to the same objection as "proximate" (*ante*, p. 65). Next the *Liesbosch* decision is possibly to be limited to the tort of negligence, and certainly to those torts in which physical damage is the only damage which is possible. It

(t) [1933] A. C. 449 (W. Cases, 24).

(u) [1933] A. C., at pp. 463—464.

(x) At p. 461. The italics are mine.

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cannot apply to libel where the damage is to a non-physical thing like the reputation. Finally, the Court regarded the loss of the dredger as not interfering with the plaintiffs' "profit-earning capacity". It is true that you interfere with a dredger-owner's profit-earning capacity if you destroy the very thing with which he earns profits. But the context of Lord Wright's speech shows that the Court meant by "profit-earning capacity" "personal profit-earning capacity", i.e., capacity independent of the tools of one's trade. Thus understood, it is obvious that the personal qualifications of any man, be he a navvy or a Harley Street specialist, are independent of the fact that he is at the moment destitute of the appliances of his calling or profession, or is flush of them, or that he is penniless or wealthy. If you injure him so that his personal profit-earning capacity is diminished, you will have to pay more if he is a medical specialist, less if he is a navvy, not because of the irrelevant circumstance that he is probably a wealthy man in the one case and a poor man in the other, but because his capacity is high in monetary value in the one case, and low in the other.

The result of the *Liesbosch Case* appears to be that in all torts in which physical damage results from the wrong, this damage, provided it is immediate, is not too remote (a).

But the *Liesbosch Case* by no means exhausts the difficulties connected with the *Polemis* decision. For both before and after the *Liesbosch Case* some distinguished members of the Court of Appeal stated the rule of remoteness in phrases which, even if consistent with *Re Polemis*, were nevertheless not coincident with the rule laid down there. They had adopted a *dictum* of Bowen, L.J., made a generation earlier in *The Argentino* (b) and in *Cobb v. G. W. Ry.* (c), that damage must be "the direct and natural consequence" of the injury. This was cited with approval by Scrutton and Greer, L.JJ., in the *Liesbosch Case* (d) when it was before the Court of Appeal, and by Greer and Maugham, L.JJ., in *The*

(a) A friendly critic in 54 L. Q. R. (1938), 128, objects to this that "the *Liesbosch Case* decided nothing of the kind because that question never arose". But I merely state the proposition as "the result of the *Liesbosch Case*", not as its decision, and I cannot agree that "the question never arose". If a Court distinguishes one case from another, the question of what was decided in each case does arise.

(b) (1888), 13 P. D. 191, 200, 202.

(c) [1893] 1 Q. B. 459, 464.

(d) [1932] P. 52, 62-64.

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Arpad (e). It is not clear what "direct and natural" means as contrasted with the simple "direct" used in *Re Polemis*. If "natural" be rejected as surplusage, there is no real difference between them; if it is not rejected, what does it signify?

A more disquieting matter is that in three cases since *Re Polemis*, Greer, L.J., equated the rule as to remoteness of damages in tort to what is known as the "first rule in *Hadley v. Baxendale*" (f) relating to remoteness of damages in contract, which lays it down that they "should be such as may fairly and reasonably be considered . . . arising naturally, i.e., according to the usual course of things" (g). Now here the reasonable foreseeability test which was expelled with a pitch-fork in *Re Polemis* has crept in again unless the words "and reasonably" be eliminated. Nor was Greer, L.J., alone in the view which he took (h); and in *Hyett v. G. W. Ry.* (i), the Court of Appeal adopted a *dictum* of his that the test of remoteness is whether the accident can be said to be "the natural and probable result of the breach of duty". Again, in *Domine v. Grimsdall* (j), Atkinson, J., applied both the "direct" test and the "reasonable foresight" test and reached the same result on the facts.

It is obvious, then, that the law is in a confused state and, if we may venture to predict the following two propositions as the main principles of remoteness, it is only with considerable diffidence and with the warning that only the House of Lords can now disperse all the doubts that have arisen (k).

(1) A consequence is not too remote if it is direct.

(2) The meaning of "direct" is this: (i) Where physical

Suggested
rules.

(e) [1934] P. 189, 216, 232—233. So, too, Lord Dunedin in *The Susquehanna*, [1926] A. C. 655, 661, 669, and Lord Hanworth, M.R., in *Re Simms*, [1934] Ch. 1, 17—18.

(f) (1854), 9 Ex. 341, 354.

(g) *The Edison*, [1932] P. 52, 70—71; *The Arpad*, [1934] P. 189, 216; *Haynes v. Harwood*, [1935] 1 K. B. 146, 156. See, too, Lord Hanworth, M.R., in *Re Simms*, [1934] Ch. 1, 17—18.

(h) Viscount Haldane, in *The Metagama* (1927), 29 Ll. L. Rep. 253, said that in maritime collision cases the damage is recoverable if it is the natural and reasonable result of the negligent act. This was cited by Langton, J., in *The Genua* (1936), 55 Ll. L. Rep. 139, 145. See, too, Slessor, L.J., in *Liffen v. Watson*, [1940] 1 K. B. at p. 537. Cf. Professor A. L. Goodhart in 2 *University of Toronto Law Journal* (1937), 1—23.

(i) [1947] 2 A. E. R. 264, 266.

(j) (1937), 106 L. J. K. B. 386.

(k) See, too, the remarks on *Re Polemis* in *Bourhill v. Young*, *post*, p. 80.

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consequences result from negligence, they are not necessarily indirect because a reasonable man would not have foreseen them. "Physical" seems to mean consequences likely to ensue in accordance with the scientific laws known to govern the world, irrespective of whether a reasonable man would have foreseen such consequences. (ii) Subject to (i), the criterion of "directness" is, "Would a reasonable man have foreseen the consequences?"

If this analysis is correct, it shows not only that there is no conflict between the "direct" test and the "reasonable foresight" test, but also that these apparently conflicting criteria are simply different aspects of the word "direct" in its application to different circumstances.

Perhaps the uncertainty of the law is not likely to be so troublesome in practice as it is in theory. If the test of "directness" of consequence leads to much the same results as the test of "reasonable foreseeability", no great difficulty would occur. Now, the "direct" test certainly proved to be a more severe rule than the "foreseeability" one on the facts in *Re Polemis* itself, for the charterers would not have been liable according to the latter for more than the trivial damage in knocking some paint off a benzine tin, and perhaps one or two of the earlier cases are inconsistent with *Re Polemis* (1). On the other hand, it is doubtful whether in the majority of cases the result would have differed whichever rule were adopted; for a consequence which is direct will nearly always be one which a reasonable (*i.e.*, average) man would foresee.

Rules as to remoteness.

We have tried to state the general principles and we can now consider the detailed rules relating to remoteness. The reports are replete with illustrations of them, and there is a corresponding danger of mistaking examples for hard-and-fast rules. It is safe, however, to set forth the following canons:

(1) A question of law.

✓(1) *Remoteness is a question for the Judge, not for the jury.* It is a question of law, not one of fact.

(2) Intended consequences never too remote.

✓(2) *Intended consequences are never too remote (m).*

(1) *Cox v. Burbidge* (1863), 13 C. B. (N.S.) 430, and *Sharp v. Powell* (1872), L. R. 7 C. P. 253, were so regarded by Sir Frederick Pollock, *Torts*, 29, n., 36. In Salmond, *Torts* (9th ed.), 142, note (h); (10th ed.), 137, note (h), *Sharp v. Powell* is regarded as supportable on other grounds not connected with remoteness of damage. Cf. Gahan, *Damages*, 12, note (q); Clerk & Linsell, *Torts*, 185.

(m) The American Restatement of *Torts*, §§ 870, 915, qualifies the rule by adding, "except where the harm results from an outside force the risk of which is not increased by the defendant's act". But this exception is unreal, for all the illustrations are explicable on some other ground (*e.g.*,

Moreover, it must be recollected that the law presumes that a man intends the necessary and natural consequences of his conduct, even though a psychologist might say that they formed no part of his original evil intention. *Scott v. Shepherd*, the squib case cited above (n), is the classical instance of this. The man who first threw the squib certainly intended to scare somebody or other. With equal certainty he did not, in common parlance, "intend" to hurt the plaintiff, much less to destroy his eye. But he was nevertheless held liable to the plaintiff, because the law insists, and insists quite rightly, that fools and mischievous persons must answer for consequences which common sense would unhesitatingly attribute to their wrongdoing (o).

(3) Unintended consequences must be direct. Whatever may be the meaning of "direct", every one agrees that a consequence is too remote if it follows "a break in the chain of causation" or is due to a "nova causa interveniens". Various classifications of the decisions on remoteness have been attempted, and some of the more detailed schemes run perilously near moulds which would wrench the law out of shape and stop its growth. On the other hand, the reports are not so poverty-stricken that we need rest content with such obscure statements as that the defendant is liable if he caused the harm, but not if he merely occasioned it, and the like. At least there is no harm in postulating the following sub-rules, provided it is understood that they are little more than specific instances of the ways in which consequences may become too remote.

(i) Where the danger created by the wrongful conduct is exhausted.

"Where defendant's active force has come to rest in a position of apparent safety, the Court will follow it no longer; if some new force later combines with this condition to create harm, the result is remote from defendant's act" (p).

Ship A negligently collides with, and injures, ship B. B puts into port and is repaired there. She again puts to sea and founders through heavy weather. Here, no doubt, B might never have encountered the storm if she had not been

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(3) Unintended consequences must be direct.

Illustrations of remoteness.

volenti non fit injuria) or are merely cases in which all the consequences were not intended.

(n) *Ante*, p. 65.

(o) See the admirable analysis in Pollock, *Torts*, 25—27.

(p) Beale, *op. cit.*, 748

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injured in the first instance, but nevertheless her loss is too remote; for it is a common occurrence for ships to encounter storms, and when B met this one she was just as well fitted to cope with it as if she had never collided with A.

(ii) *Other circumstances which the Court may hold sufficient to snap the chain of causation.*—It will be seen in examining these that they certainly do not represent rules but merely provide examples. In some cases they exhibit consequences as too remote, in others as still remaining direct in spite of what looks like an interruption in causation. This is notably so with contributory negligence.

(a) *Unlawful conduct of third parties.*—"In general", said Lord Sumner, "(apart from special contracts and relations and the maxim *Respondeat superior*), even though A is in fault, he is not responsible for injury to C which B, a stranger to him, deliberately chooses to do. Though A may have given the occasion for B's mischievous activity, B then becomes a new and independent cause." Consistently with this, it was held that if A writes a libel on C, which is published by B over whom A has no control, A is not liable to C. Until publication, no tort at all is committed, and when publication does take place, it is due to B, not to A (q). But it is certainly not the law that deliberately wrongful conduct on B's part will always make the conduct of A, the original wrongdoer, too remote. If A has control over B's action, or over the circumstances which any reasonable person would have foreseen were likely to prompt B's action (r), the harm will be attributed to A. Moreover, if B's wrongdoing is careless and not deliberate, it will depend on the facts of each case whether that will exempt A from liability to C.

In *Hill v. New River Co.* (s), the defendants unlawfully left unfenced a stream of water spouting in the highway. This frightened the plaintiff's horses which fell into an unfenced excavation made in the road by B. The defendants were held liable as having primarily caused the accident despite the negligence of B (t).

(q) *Weld-Blundell v. Stephens*, [1920] A. C. 956, 986. Note Lord Sumner's careful analysis of earlier cases at pp. 988—991.

(r) *Gaynes v. Haricood*, [1935] 1 K. B. 146.

(s) (1868), 9 B. & S. 303; *Northwestern Utilities, Ltd. v. London Guarantee, etc., Co., Ltd.*, [1936] A. C. 109, is also relevant, although the decision was rather as to the scope of the duty to take care.

(t) *Semble*, B would have been liable also if plaintiff had preferred to sue

In *Haynes v. Harwood* (u), the wrongful act of B was deliberate, not merely careless. A had negligently left a horsed van unattended in a crowded street where there were many children. B, a mischievous boy, threw a stone at the horses, frightened them, and they ran away and injured C. Here A was held liable in spite of the act of B, for A knew that children were about and the injury to C must be treated as a result of A's wrongful act because it was to be anticipated that children would do mischievous things. "Any one who invites or gives an opportunity to mischievous children to do a dangerous thing cannot escape liability on the ground that he did not do the wrong" (a).

Compare with this *S.S. Singleton Abbey v. S.S. Paludina* (b), which fell on the other side of the line. Ships A, B, and C were in port where a strong wind and swell prevailed. Then came in sequence the following events: (1) A negligently collided with B and thus made (2) B collide with C. B and C got clear, but twenty minutes later, while B and C were trying to keep off shore, (3) C again collided with and injured B. A was held liable for collision No. (1). Was A also liable for No. (3)? No, if the chain of causation between (1) and (3) were broken either (a) by B's inability to prove due care on C's part in the group of events constituting No. (3), or (b) by lack of due care on B's part in No. (3). On the facts, a majority of the House of Lords held that (a) B had failed to prove due care on C's part; (b) that B had shown no lack of due care because, in the agony of the collision, B's captain had done his best. Thus, the chain of causation was snapped at (a), but not at (b), and, as the breaking of one link suffices to sever the whole chain, A was held not liable for No. (3).

(b) *Lawful conduct of third parties*.—This may, or may not, according to circumstances, make the consequences too

him either separately or jointly with defendants. *Burrows v. March Gas Co* (1870), L. R. 5 Ex. 67, 71, 74 (affirmed without reference to this point in L. R. 7 Ex. 96).

(u) [1935] 1 K. B. 146.

(a) Greer, L.J., at p. 154, where the learned L.J. examined some of the earlier authorities. *Shiffman v. Grand Priory, etc.*, [1936] 1 A. E. R. 557, is to the like effect: defendant was held liable for negligence in insecurely erecting a flag-pole which fell upon the plaintiff, although its actual collapse was due to the acts of mischievous children. So, too, *Wells v. Metropolitan Water Board* (1937), 54 T. L. R. 104.

(b) [1927] A. C. 16.

§ 21. (c) remote. It was held to do so in *Harnett v. Bond* (c), where the plaintiff, a lunatic in the custody of Adam, the owner of an asylum, was released on probation for twenty-eight days. He visited Bond, a Commissioner in Lunacy, who mistakenly judged the plaintiff to be still mad, informed Adam by telephone of his opinion, and detained plaintiff for two or three hours while Adam sent to fetch him back to the asylum. The plaintiff was then detained for nine years in that asylum and in others. He then escaped and sued Adam and Bond. Bond was held liable for falsely imprisoning him during the two or three hours, but not for the subsequent nine years' detention, for that was due to the acts of Adam and of the other persons who, in succession, had custody of the plaintiff. Now Adam's acts were justified by the Lunacy Act, 1890, s. 330 (1), because he had acted "in good faith and with reasonable care" under that section; but it was not the legality of his acts that snapped the chain of causation, but the facts that he was bound by law to exercise a judicial and independent discretion in deciding whether he should detain the plaintiff, and that the exercise of that discretion was a new starting point in causation (d).

In *The Oropesa* (e), the lawful act of a third party did not make the consequence too remote. After a collision between ship A and ship B, caused mainly by the negligence of B, the master of A thought that his ship, though badly damaged, could be salvaged. He therefore embarked in a lifeboat in order to go to B and to discuss with the master of B what steps ought to be taken. Among other persons in the lifeboat was C, one of the engineers of A. Before the lifeboat reached B, it capsized owing to increased roughness of the weather, and C was drowned. The owners of B were held liable to C's personal representatives. The master of A had acted reasonably (and therefore lawfully) in trying to prevent total loss of his ship, and reasonable conduct on the part of any person subsequent to the tortious act of another person does not break the chain of causation even if events show that the conduct constituted an error of judgment.

(c) *Lawful act of the plaintiff*.—In *The San Onofre* (f),

(c) [1925] A. C. 669. See Dr. Stallybrass's investigation of cases of this type in Salmond, Torts, § 34 (27).

(d) Scrutton, L.J., in the C. A., [1924] 2 K. B. at p. 565.

(e) [1943] P. 32. See, too, Lord Wright in *Summers v. Salford Corporation*, [1943] A. C. 283, 296.

(f) [1922] P. 243.

a ship of that name was negligently struck by the *Melanie*. The *San Onofre* was slightly damaged, the *Melanie* very seriously. The *San Onofre* lashed herself to the *Melanie* in order to save her and, while taking her inshore, ran aground with her in a fog and received fresh injuries herself. Could it be said that the damage to the *San Onofre* from running aground was causally connected with the original negligence of the *Melanie*? No, for the case was similar to that where two pedestrians collide in the street, and the one whose negligence caused the collision is assisted by the other to walk to hospital, and while so doing the helper accidentally slips and breaks his own leg. This last catastrophe has no connexion in law with the original accident. Yet it might well be a direct consequence if the wrongdoer, being in danger of death from the collision, were hurried to hospital with all reasonable care by the other injured party in his car and the latter were further injured by a second collision due to no fault of his own (g).

(d) *Unlawful conduct of the plaintiff*.—The commonest example of this is contributory negligence (h). In view of the Law Reform (Contributory Negligence) Act, 1945, we defer consideration of this (*post*, § 126).

Several other points require notice. One is the legal position of a plaintiff who does the best that he can to avoid a dilemma produced by the defendant's wrongdoing. He selects in haste, or "in the agony of the moment", a course which events show to be the wrong one and which results in injury to him. Is the defendant liable for this consequence? It is difficult to know where to discuss this problem, for the Courts have approached it by the various paths of remoteness of consequence, contributory negligence and *volenti non fit injuria*. On the whole it is perhaps best reserved for the chapter on Negligence (*post*, § 126).

Dilemma
produced by
negligence.

Next, suppose that the injury produced by the defendant's wrongdoing causes nervous shock to the plaintiff. It is not clear from the authorities whether nervous shock is a substantive tort or a particular instance of damage flowing

Nervous
shock.

(g) *Per* Atkin, L.J., at pp. 255—256. *Admiralty Commissioners v. S.S. Amerika*, [1917] A. C. 38, illustrates the same point as the *San Onofre* Case.

(h) *Howard v. Odhams Press, Ltd.*, [1938] 1 K. B. 1, falls under contract rather than tort in this connexion.

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from the commission of some particular tort (i). On balance, the latter view seems preferable, subject to the qualification that, where the shock is caused by the tort of negligence, the plaintiff may be so hypersensitive as to exclude him from the scope of the defendant's duty to take care: *Bourhill v. Young*, [1943] A. C. 92 (*infra*). Liability for nervous shock is now well established, subject to the limits stated below. A contrary decision of the Judicial Committee in 1888 (k) proceeded on erroneous ideas about pathology and was never followed in the other Courts (l). The fallacy lay in supposing that "bodily" or "physical" injury must exclude "mental" injury as being too remote. It would be difficult to contend that damages ought to be given for the mere sensation of fear (m), but when fear or any other sensation produces a definite illness, that consequence is no more remote than a broken bone or an open wound.

Bourhill v. Young (n) is the latest and best authority. X, a fishwife, alighted from a tramcar. While the driver was helping her to put her fish-basket on her back, Y, a motor-cyclist, passed the tram and immediately afterwards negligently collided with Z's motor car. Y was killed. X did not see Y or the accident, which occurred about fifteen yards off, her view being obstructed by the tram, but she heard the collision and, after Y's body had been removed, she approached the spot and saw the blood left on the road. In consequence she sustained a nervous shock and gave birth to a stillborn child of which she was eight months pregnant.

(i) Cf. Wright, J., in *Wilkinson v. Downton* [1897] 2 Q. B. 57, 58—59; Kennedy, J., in *Dulieu v. White*, [1901] 2 K. B. 669, 671, and Phillimore, J., *ibid.*, 682, 685; Bankes and Duke, L.JJ., in *Janvier v. Sweeney*, [1919] 2 K. B. 316, 321—322, 327; Bankes and Atkin, L.JJ., in *Hambrook v. Stokes*, [1925] 1 K. B. 141, 146, 154, 158; Lord Shaw, in *Coyle v. John Watson, Ltd.*, [1915] A. C. 1, 13, approving Palles, C.B., in the Irish case of *Bell v. G. N. Ry. of Ireland* (1890), 26 L. R. Ir. 428, 437; *Owens v. Liverpool Corporation*, [1939] 1 K. B. 394. The American Restatement of Torts, vol. 1, § 17, reckons nervous shock as an illustration of the tort of bodily harm rather than as a consequence of it. Cf. Professor C. Magruder in 49 H. L. R. (1936), 1033—1067, Bohlen, *Studies in the Law of Torts* (1926), 252—290.

(k) *Victorian Railway Commissioners v. Coultas*, 13 App. Cas. 322.

(l) See cases cited in note (i).

(m) According to the American Restatement of Torts, vol. 1, § 47 (cf. vol. 2, §§ 306, 312; vol. 3, § 623), emotional distress unaccompanied by physical illness is not itself a ground of liability, although it may aggravate damages flowing from an intentional tort which caused harm independently of such distress.

(n) [1943] A. C. 92 (W. Cases, 164). For comments on it, see 59 L. Q. R. (1943), 150—154 (Dr. Charlesworth); 8 Cambridge Law Journal (1944), 265—273 (Prof. Goodhart).

She sued the personal representative of Y for Y's negligence. § 21.
The House of Lords held that she could not recover. Their decision may be thus epitomised. Where Y causes nervous shock to X, X's degree of susceptibility to such shock is relevant to two distinct things: (1) Determination of the existence of a duty on Y's part to take care with respect to X. This "must generally depend on a normal standard of susceptibility" (o) and if no reasonable person would have foreseen the shock to X, no duty arises on Y's part to take care to prevent it, on the principle stated in § 123, *post* (*Donoghue's Case*). It was solely on this ground that the House of Lords based their decision in *Bourhill v. Young*. The fact that Y had been negligent with respect to Z did not, on the facts of the case, bring X within the ambit of his duty to take care while on the highway. X was not within the area of potential danger, and *Bourhill v. Young* was distinguished by the Court of Appeal in *Farrugia v. G. W. Ry.* (p), where the defendants were held liable because *the plaintiff in that case was within that area.* (2) Determination of remoteness of consequence, where Y's duty towards X and its breach have been established. All *dicta* on this point were *obiter* because the House held that no such duty had been established. Subject to that caution, it was observed that if the duty of Y towards X, and Y's breach of it, are proved, Y must take his victim as he finds him (*talem qualem*); e.g., it is no defence that X has an "egg-shell" skull or an abnormal tendency to effusion of blood. Even so, nervous shock, where that is the injury, may be too remote. As to the test of remoteness, opinions in the House of Lords differed (q).

A case that was commented upon in *Bourhill v. Young* was *Hambrook v. Stokes* (r). By S's negligence, his unattended lorry started to run violently down a steep and narrow street. H saw it coming and was terrified for the safety of her children from whom she had just parted and who had turned a bend in the street out of her sight. Bystanders told her immediately afterwards that a child answering to the

(o) Lord Wright, [1943] A. C. at p. 110

(p) [1947] 2 A. E. R. 565

(q) Lord Wright accepted the "direct" test laid down in *Re Polemon* as limited by the *Liesbosch Case* (*ante*, pp. 68-71). Lords Macmillan and Porter questioned the correctness of the "direct" test. Lord Russell of Killowen apparently approved the "reasonable foresight" test (*ante*, p. 66).

(r) [1925] 1 K. B. 141 (W. Cases, 27).

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description of one of her own had been injured. She sustained a nervous shock and died in consequence. A majority of the Court of Appeal held that her husband could recover for the loss of her services, assuming that the shock was caused by what H herself had seen as distinguished from what the bystanders had told her; and they disapproved a *dictum* of Kennedy, J., in *Dulieu v. White* (s) that shock arising from fear of injury to others, as distinct from fear of injury to oneself, is too remote.

The soundness of *Hambrook v. Stokes* was not directly in point in *Bourhill v. Young* and none of the Lords finally committed himself as to this, but, subject to that caveat, Lord Wright expressed approval of it and Lord Porter impliedly did so; Lord Russell disapproved it; Lords Thankerton and Macmillan simply reserved their opinions (t).

Plaintiff
must prove
causal
connexion.

It is worth while to add that the plaintiff must give evidence of sufficient causal connexion between the defendant's misconduct and the injury to the plaintiff. This was illustrated in *Metropolitan Ry. v. Jackson* (u). Jackson was a passenger on a train of the company. At Gower Street the company's officials negligently allowed three persons to enter Jackson's compartment which was already full, and these three were obliged to stand. At Portland Road there was a rush on the platform and other persons opened the carriage door. Jackson stood up to prevent their entry. The train began to move. Jackson, to save himself from falling, put his hand on the edge of the door. At that moment a railway porter came up, pushed away the intruders and shut the door by slamming it, and thus crushed Jackson's thumb. The House of Lords held that the evidence did not show that the company had caused the injury to the thumb. No doubt

(s) [1901] 2 K. B. 669, 675.

(t) We suggest that *Hambrook v. Stokes* was correctly decided. It would be harsh to hold that, while fear for oneself will ground an action, fear for the safety of those whom one is bound to protect will never do so. On the other hand, we respectfully think that the disapproval by Lords Wright and Porter in *Bourhill v. Young* of *Owens v. Liverpool Corporation*, [1939] 1 K. B. 394, was right (coffin in a funeral procession negligently overturned; relatives, who saw the accident, held entitled to recover for nervous shock).

The American Restatement of Torts, §§ 26, 313, regards it as no assault if A makes B fear that A will intentionally hit C, no matter how closely related C is to B (the reason being that assault is a highly specialised idea); but somewhat oddly, the Restatement leaves it doubtful whether B would have a remedy if A's conduct were merely negligent.

(u) (1877), 3 App. Cas. 193.

there was negligence of the company at Gower Street in allowing the carriage to be overcrowded, and possibly that might have caused the accident at Portland Road; but Jack-son gave no evidence that it had done so. At Portland Road itself there was no negligence at all, for the porter did all that could be expected of him in hastily shutting the door as the train entered a tunnel. He might have done exactly the same if the proper number of passengers had been in the carriage. If the negligence at Gower Street had affected Jack-son's movements, or the particular part of the carriage where he was sitting, or if it had made him less in control of his actions when he stood up or fell forward, that ought to have been proved in evidence; in fact no such evidence was given (a).

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(a) *Ibid.*, 198. 205—206, 209—210, 212.

CHAPTER III

CAPACITY

§§ 22, 23.

Capacity
explained.

§ 22. The title of this chapter is a compendious abbreviation of "Variations in capacity to sue, or liability to be sued, in tort". The word "status" would have done equally well, but unluckily there is not much agreement in books on jurisprudence as to what exactly it comprises. Where I use it I venture to employ it as equivalent to "capacity" in the sense stated above.

Every system of law and every branch of each system must recognise variations in favour of, or against, abnormal members of the community. Who are to be reckoned as abnormal is a question of policy which each country must settle for itself. The hangman had a status in some parts of Europe; he never had one with us. Further, it will often happen that even in the same country a person is counted as abnormal in one age and as normal in another. Heretics, and Jews were once under disabilities in England which have now disappeared (a).

In the law of tort the chief variations in capacity are to be found with the State and its officials, minors, married women, lunatics, corporations and servants. They are all much the sort of people whom one would expect to be classed as abnormal, except the married woman, who is a historical survival, and the servant, who is a historical revival, for in early law he had a status, then lost it and has now regained it.

✓ § 23. The State and its subordinates.

The State
and its
subordinates
(1) The
Crown

(1) The Crown. The law relating to the liability of the Crown must be considered under the two following heads.

(i) Liability in tort. Here, the law has been greatly changed by the Crown Proceedings Act, 1947 (b). It must be noted at the start that nothing in the Act authorises proceedings in tort against His Majesty in his private capacity (s. 40), or affects powers or authorities exercisable by virtue of the prerogative of the Crown or conferred upon the Crown by

(a) Salmond & Winfield, *Contracts*, § 131

(b) 10 & 11 Geo 6, c. 44. The Act came into operation on January 1, 1948 (Crown Proceedings Act (Commencement) Order, 1947, (No. 2527)).

statute (s. 11 (1)). Subject to this, the Act provides (c) that the Crown shall be subject to all those liabilities in tort to which, if it were a person of full age and capacity, it would be subject (1) in respect of torts committed by its servants or agents (d), provided that the act or omission of the servant or agent would, apart from the Act, have given rise to a cause of action in tort against that servant or agent or against his estate; (2) in respect of any breach of those duties which a person owes to his servants or agents at Common Law by reason of being their employer; (3) in respect of any breach of the duties attaching at Common Law to the ownership, occupation, possession or control of property. Liability in tort also extends to breach by the Crown of a statutory duty. The Crown is not to be held liable for wrongs committed by any person in the exercise of judicial functions. The law as to indemnity and contribution as between joint tortfeasors (*post*, Chap. V) shall be enforceable by or against the Crown (e) and the Law Reform (Contributory Negligence) Act, 1945 (*post*, § 126) binds the Crown (f). There are qualifications in the Act with respect to shipping, postal packets and the armed forces of the Crown, but we cannot give further details here (g). Both these qualifications and the sections which we have summarised show that the Act does not wipe out totally the Common Law immunity of the Crown, and it is therefore necessary to give an outline of it.

✓ No action in tort was maintainable against the Crown. The reason for this was that "the King can do no wrong", but it was not until the sixteenth century that it was established as law. When mediæval law began there was no trace of it. True, the King could not be sued in his own Courts, but that was only an instance of the rule that no feudal lord could be sued in his own Court. With the King it was an accidental result that, unlike other feudal lords, there was no higher Court in which he could be sued. Far from being credited with a fabulous impeccability, he might, like Henry VI in the early years of his reign, run the risk of official chastisement if he misbehaved. But when it came to be realised that the subject would have no remedy if his

(c) S. 2.

(d) "Agent" includes an independent contractor (s. 38 (2)).

(e) S. 4 (1), (2).

(f) S. 4 (3).

(g) See ss. 5-8, 9, 10, of the Act.

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monarch did certain acts, it was laid down that he could not do such acts; and it was a short step from that to say that the King could do no wrong. This dogma would have been worthless to the subject if it had not had a corollary tacked to it in the seventeenth century,—that for every political act of the King some minister is responsible (h).

(ii) *The petition of right.* This remedy against the Crown is available only “where the land or goods or money of a subject have found their way into the possession of the Crown, and the purpose of the petition is to obtain restitution, or if restitution cannot be given, compensation in money; or where the claim arises out of a contract (i). Of course the taking or withholding of the property must be wrongful; it is not wrongfully taken if the Crown merely forbids its use in a particular way; e.g., by ordering a subject not to unload coal during a general strike (k).

The rule that the King can do no wrong has also been used as a reason for denying the application of a petition of right to a claim in tort. “That which the sovereign does personally, the law presumes will not be wrong: that which the sovereign does by command to his servants cannot be a wrong in the sovereign, because, if the command is unlawful, it is in law no command, and the servant is responsible for the unlawful act, the same as if there had been no command” (l). Constitutional monarchy being what it is with us, we need not weigh this argument very closely. As has been said, a petition of right is available where property is wrongfully taken, and that was at one time a much wider exception than it is now, because mediæval law had no boundary worth the name between the law of property and the law of tort (m). There has been some conflict of opinion on the question whether, if the Crown wrongfully declines to restore a chattel

(h) Holdsworth, H. F. L., iii, 463–469; vi, 266–267.

(i) *Per curiam* in *Feather v. R.* (1865), 6 B. & S. 257, 291; cited with approval by the Privy Council in *Windsor & Annapolis Ry. v. R. & Counties Ry.* (1886), 11 App. Cas. 607, 614, and by the C. A. in *Anglo-Saxon Petroleum Co., Ltd. v. Darnant*, [1917] K. B. 794, 801.

(k) *France, Fenwick & Co., Ltd. v. R.*, [1927] 1 K. B. 458. Nor apparently will a petition of right lie for a quasi-contractual claim, like *assumpsit* for money had and received: *Blackbank v. R.*, [1925] 1 K. B. 52; *Civilian War Claimants Association v. R.*, [1932] A. C. 14, 24. *Contra*, Salmond, *Torts*, 48, note (c), where the learned editor has changed his view since the 7th ed., 71, note.

(l) *Tobin v. R.* (1864), 16 C. B. (N.S.) 310, 354.

(m) Holdsworth, *op. cit.*, ix, 17–21.

or finds itself unable to restore it, a petition of right is maintainable for pecuniary compensation. It is argued on the one hand that the petition cannot lie because that would be allowing a remedy against the Crown for the tort of conversion and no petition of right lies for a tort. To this it has been retorted that the weight of the older authorities is in favour of allowing a petition of right for such compensation. There is a modern dictum against the possibility of a claim for conversion (n), but the balance of authority at present is in favour of the petition of right being applicable for such compensation (o). Another question is whether a petition of right will lie for nuisance. Sir William Holdsworth thought that there is no historical reason why it should not lie, but that it is highly doubtful whether it would be held to do so nowadays (p). The Crown Proceedings Act, 1947, allows the claim under a petition of right to be made without a fiat (i.e., permission) from the Crown, but does not alter the scope of the petition.

✓ (2) *State Officials*.—A convenient division of the powers of State officials is that into executive acts and judicial acts.

(2) State Officials.

(i) *Executive acts*.—If Government officials act within their powers, of course they are not liable however much they may injure other people by their official acts. Any other rule would paralyse the government of the country. But if they act outside their lawful powers, they are liable, although, until the Crown Proceedings Act, 1947 (*ante*, p. 83), they could not be sued as representatives of the Crown, for the public revenues could not be made liable without the Crown's consent to remedy wrongs committed by servants of the Crown (q). This was a hard rule for the person injured by the excess of authority, for, though the official was (and still is) liable as a private individual (r), he is often not worth suing.

(i) Executive acts.

(n) *Romer, J.*, in *Re Mason*, [1928] Ch. 385, 401.

(o) *Feather v. R.* (1865), 6 B. & S. 257, 294, and the other cases cited, p. 84, note (i), *ante*.

(p) Holdsworth, H. E. L., ix, 43. See note (o), *supra*.

(q) *Per Atkin, L.J.*, in *Mackenzie-Kennedy v. Air Council*, [1927] 2 K. B. 517, 531. See, too, *Raleigh v. Goschen*, [1898] 1 Ch. 73; *Hulton v. Secretary of State for War* (1926), 43 T. L. R. 106. In *Adams v. Naylor*, [1946] A. C. 543, the H. L. pointed out that, though it is common practice, when a servant of the Crown is sued in tort, for the Crown to supply, on the plaintiff's request, the name of the servant (e.g., the driver of a Crown vehicle by whose alleged negligence the plaintiff was injured), this in no way makes the Crown a party to the action; so, too, where the Crown allows as a matter of grace payment of the damages awarded against its servant to be made out of the public funds.

(r) *Raleigh v. Goschen*, [1898] 1 Ch. 73, 82.

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However, the Act of 1947, by making the Crown liable in general for the torts of its servants or agents, has lessened this grievance. There are classical decisions that, where an official has been sued in his private capacity, a plea of *respondeat superior* will avail him nothing (s). Occasionally, statutes provide that a particular Government department, or the Minister of it, may sue or be sued. If, under such a statute, an action is brought against a Minister, it is in his official capacity that he is being sued, and not as a private individual; therefore, if judgment for a sum of money is given against him, he is not personally liable to pay it, but presumably he will pay it out of moneys provided by Parliament for his office (t).

Even where the official is sued in his private capacity, several qualifications must be noticed.

No vicarious liability. C.

(a) Vicarious responsibility is not to be attributed to an official. It will be seen, when we come to deal with the law of master and servant, that a master is liable for all torts of his servant committed in the course of the servant's employment. This rule has no application to the head of a Government department. He is not liable for the torts of his subordinates unless the tort was substantially his act, for both he and they are equally servants of the Crown, although he may appoint his subordinates; and, moreover, it would be unjust to make him liable for their defaults when he can make no use of the public revenue to meet such liability. Hence, the Postmaster-General has been held not liable for negligent obstruction of a highway by an employee in the repair of a telegraph cable (u). The Minister of Transport is a statutory exception to this rule (a). In practice, moreover, the Treasury Solicitor or the Solicitor to the department concerned usually attends an action against the subordinate,

(s) *Wilkes v. Wood* (1763), 19 St. Tr. 1153; *Entick v. Carrington* (1765), *ibid.*, 1030.

(t) *Minister of Supply v. British Thomson-Houston Co., Ltd.*, [1913] K. B. 478, where the C. A. explained its earlier decision in *Mackenzie-Kennedy v. Air Council*, [1927] 2 K. B. 517. In that case, a statute provided that "the Air Council may sue and be sued", but an action against it was held not to be maintainable; the C. A., in the later case, said that the real reason why the Air Council was held not liable was that there had been no transfer to it of the obligations of the Air Board on which the plaintiff based his claim. Cf. 59 L. Q. R. (1913), 196—197. See, too, *The Brabo*, [1948] P. 33.

(u) *Bambridge v. Postmaster-General*, [1906] 1 K. B. 178; *Kynaston v. Att.-Gen.* (1933), 49 T. L. R. 300.

(a) Ministry of Transport Act, 1919 (9 & 10 Geo. 5, c. 50), s. 26.

and the Treasury, as a matter of grace but not of legal obligation, pays damages if the subordinate is found liable (b). Recently the Lord Chancellor has appointed an independent person to certify in cases of this kind (if the claimant should so desire) whether the subordinate was acting in the course of his employment (c). Previously, the decision of this point had been solely with the department concerned. Until recently the practice of the Treasury Solicitor was to supply the name of a merely nominal defendant for the purposes of the action, *i.e.*, a person who, though a Government servant, had nothing to do with the alleged wrong. But in *Rouster v. Cavey* (d) it was held (e) that the Court has no jurisdiction to try the case unless the subordinate named by the Treasury Solicitor was the person who apparently had committed the tort.

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(b) Act of State—This phrase has several meanings and their detailed examination has given constitutional lawyers some trouble (f). It may signify (1) an act that, "on its face, injures nobody, *e.g.*, recognition by the British Government of a foreign sovereign; (2) an act done by a foreign State within its territorial jurisdiction which injures a British subject; this gives no right of action to the subject (g), whatever may be its aspect in International Law; (3) a transaction between the British Government and another State that injures a British subject (h); this likewise gives no right of action; (4) according to Sir Fitzjames Stephen:

(b) Dicey, *Law of the Constitution* (9th ed.), 531; Crown Proceedings Report (1927), Cmd. 2842.

(c) This was in consequence of a debate on the topic in the House of Lords, April 13, 1942; Hansard, vol. 122, 535—568.

(d) [1917] 1 K. B. 204.

(e) By the C. A., acting upon emphatic *obiter dicta* of the H. L. in *Adams v. Naylor*, [1946] A. C. 543.

(f) W. Harrison Moore, *Act of State* (1906); Wade & Phillips, *Constitutional Law* (3rd ed.), 176—177; Keir & Lawson, *Cases in Constitutional Law* (1933), 295—298; Sir William Holdsworth in 41 *Columbia Law Review* (1941), 1313—1331; Stephen's *Commentaries* (19th ed., 1928), iv, 286—292. See, too, Pollock, *Torts*, 88—92. Mr. Wade, in his careful analysis of the term in 15 *British Year Book of International Law* (1934), 98—112, defines it (at p. 103) as "an act of the Executive, as a matter of policy performed in the course of its relations with another State, including its relations with the subjects of that State, unless they are temporarily within the allegiance of the Crown". See, too, Fletcher Moulton, L.J., in *Salaman v. Secretary of State for India*, [1906] 1 K. B. 613, 639—641.

(g) *Carr v. Francis Times & Co*, [1902] A. C. 176.

(h) *E.g.*, *Cook v. Sprigg*, [1899] A. C. 572. There are other cases involving the same principle, although "act of State" is not the exact phrase used in them: *c.g.*, *Civilian War Claimants Association v. R.*, [1932] A. C. 14.

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“An act injurious to the person or to the property of some person who is not at the time of that act a subject of [His] Majesty; which act is done by any representative of [His] Majesty’s authority, civil or military, and is either previously sanctioned or subsequently ratified by [His] Majesty” (i). For such acts the representative is not liable. It is this fourth meaning which we shall develop here. The case always cited for it is *Buron v. Denman* (k). The plaintiff, a Spaniard, owned some slaves and slave barracoons on the West coast of Africa outside British dominions. The defendant, a captain in the Royal Navy, released the slaves and set fire to the barracoons. He had no authority to do so, but his act was ratified by the Crown, and the Admiralty in congratulating him on his “spirited and able conduct”, granted him £4,000,—“the most conclusive ratification in English naval history”. It was held that Buron had no remedy against him for trespass. The principle of the decision was not very clearly stated (l), but some years later Cockburn, C.J., deduced it to be that in such circumstances the alien’s private right of action becomes merged in the international question which arises between our Government and that of the alien (m).

The person injured must be an alien. If he is a British subject, it is useless to plead that an injury to him is justifiable as an act of State. The Common Law knows no distinction between “State” offences and other offences. And for this purpose a friendly alien resident in British territory is on the same footing as a British subject. His residence sets up the obligation of allegiance to the Crown and confers upon him corresponding benefits even though he is not in fact a British subject. A remarkable illustration of this was *Johnstone v. Pedlar* (n). Pedlar, an Irishman, became a naturalised American citizen, returned to Ireland in 1916, took part in the rebellion there, and was deported. In 1917 he returned to Ireland, and in 1918 was arrested there for illegal drilling. A sum of money found upon him was confiscated by the police, their action being ratified by the Chief Secretary for Ireland. Pedlar sued the Chief

(i) History of Criminal Law, II, 61—62.

(k) (1848), 2 Ex. 167.

(l) 2 Ex. at p. 189.

(m) *Feather v. R.* (1865), 6 B. & S. 257, 296.

(n) [1921] 2 A. C. 262 (W. Cases, 32).

Commissioner of Police for wrongful detention of the money or alternatively for damages for conversion of it. The defendant pleaded act of State. The House of Lords held the defence bad and gave judgment for Pedlar, and it may be inferred from their decision that even where a resident alien flagrantly violates his local allegiance to the Crown, as Pedlar had done, yet he still retains his rights until the Crown withdraws its protection. The case makes it plain that the principle in support of act of State put forward by Cockburn, C.J. (*supra*) (o), must be modified to some extent. Pedlar was an alien and injuries done to him were just as likely to give rise to international questions whether he lived in Ireland or in America. Ought not such injuries to be reckoned as acts of State? No, because the competing principle that local allegiance confers local rights must be taken to prevail. To deny an action in tort in such circumstances to resident aliens would be to put a great number of persons at the mercy of any department entitled to use the name of the Crown for an 'Act of State' (p).

* A mere visitor to the United Kingdom is probably on the same footing, for this purpose, as a resident alien (q).

Several questions connected with act of State are outstanding.

✓ First, in order that an injury may be reckoned as an act of State, must it be committed outside the British dominions? The answer is doubtful. Most of the textbooks reply in the affirmative, relying chiefly upon *dicta* in *Johnstone v. Pedlar* (r), which, however, were *obiter* and not unanimous (s). In spite of this divergence, Scrutton and Atkin, L.JJ., were of opinion *obiter* in the later case of *Commercial Estates Co. of Egypt v. Board of Trade* (t) that *Johnstone v.*

(o) The principle seems to be impliedly recognised in *Johnstone v. Pedlar*, [1921] 2 A. C. at pp. 271, 275, 278, 290.

(p) Lord Finlay, *ibid.*, at p. 273.

(q) The Scottish Case, *Poll v. Lord Advocate* (1899), 1 F. 823, contains *dicta* to the contrary, but they were adversely criticised in *Johnstone v. Pedlar*, [1921] 2 A. C. at pp. 277, 289.

(r) Salmond, *Torts*, s. 11 (4); Clerk & Lindsell, *Torts*, 78; Wade & Phillips, *Constitutional Law* (3rd ed.), 178; Wade in 15 *British Year Book of International Law* (1934), 99; 26 *Laws of England* (Halsbury), 2nd ed., § 564. Dicey, *Conflict of Laws* (5th ed., 1932), p. 215, refers, on this point, to torts committed "on any person while in British territory", but here the question is as to injuries inflicted abroad.

(s) [1921] 2 A. C. at pp. 272 (Lord Finlay), 290 (Lord Sumner). Lord Cave declined to express an opinion (at p. 277). Lords Atkinson and Phillimore did not touch upon the point.

(t) [1925] 1 K. B. 271, 290, 297.

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Pedlar favoured the view that act of State is inapplicable as a defence unless it be committed outside the realm. But in the later case of *Netz v. Ede (u)*, it was held that an order for deportation of an alien enemy, who was interned in England, was an act of State, but no reference was made to the question at the beginning of this paragraph (a).

Secondly, does act of State include injuries inflicted by any Crown official? On principle it ought to be immaterial whether the official is high or low in degree. But in *Johnstone v. Pedlar* Lord Cave and Lord Sumner doubted whether seizure by a person so low in the official hierarchy as a police officer of money found upon the plaintiff could properly be described as an act of State (b).

Thirdly, if the injury is neither authorised nor ratified by the Crown, what is the position of the alien? We shall see in a later section that, if a wrong is tortious according to English law and is not justifiable according to the law of the foreign place where it is committed, it is actionable in England (c). To that extent, then, the alien is in the position of a British subject. But presumably he is in no better position, and he could therefore be met by the same defences as a British subject,—in particular that which is described in the next paragraph (d).

Honest mistake.

(c) A possible qualification of the rule that superior orders cannot justify an otherwise unlawful act is that an officer of the law who executes process apparently regular, without knowing that in fact the person who authorised him to do so had exceeded his powers, is protected in spite of the proceeding being ill-founded. There is weighty opinion in favour of this exemption, but no actual decision (e). Again, by the

(u) [1946] Ch. 224.

(a) It has been suggested that the principle of *Buron v. Denman* is simply the fact that our Courts have no jurisdiction in such matters and that inquiry why they have none is beside the point. If that is so, then the defence of act of State ought to be inapplicable, for an English Court has jurisdiction whenever an action is founded on a tort committed in England (Rules of the Supreme Court, Ord. 11, rule 1 (ee)); but I find no real authority for the suggestion.

(b) [1921] 2 A. C. at pp. 277, 290.

(c) *Post*, § 48.

(d) It may be noted here that probably a friendly alien has, apart from statute, no legal right enforceable by action to enter British territory: *Musgrove v. Chun Teeong Toy*, [1891] A. C. 272, and *dicta* in *Johnstone v. Pedlar*, [1921] 2 A. C. 262, 276, 289, 292, 296.

(e) *London (Mayor of) v. Cox* (1867), L. R. 2 H. L. 239, 269; Pollock, Torts, 95. The American Restatement of Torts, vol. 1, 146, is to the like effect.

Constables Protection Act, 1750 (f), no action can be brought against a constable for anything done in obedience to any warrant issued by a justice of the peace until the would-be plaintiff has made a written demand for a copy of the warrant and the demand has not been complied with for six days.

✓ If it is complied with, then the constable, if he produces the warrant at the trial of the action against him, is not liable in spite of any defect of jurisdiction in the justice (g). But if he arrests a person not named in the warrant or seizes goods of one who is not mentioned in it, he does so at his peril. His mistake, however honest, will not excuse him. In *Hoye v. Bush* (h), Richard Hoye was suspected of stealing a mare. A warrant was issued for his arrest, but it described him as "John Hoye", which in fact was his father's name. Richard was arrested under this warrant and subsequently sued Bush, the constable, for false imprisonment. Bush was held liable, for although Richard was the man who actually was wanted, still the warrant described somebody else and it did not help Bush that John Hoye was not really wanted.

✓ If, however, the mistake were deliberately induced by the arrested person himself, e.g., as a practical joke upon the constable, *volenti non fit injuria* would be a valid defence. ✓

✓ How far superior orders can be pleaded as a justification in a civil action against a member of the armed forces of the Crown is a question which has never been decided. Willes, J., was of opinion that "an officer or soldier, acting under the orders of his superior—not being necessarily or manifestly illegal—would be justified by his orders" (i). This suggestion seems to be sensible enough and would almost certainly be applied in a criminal charge against the soldier, but there is disagreement with respect to its soundness in civil liability (k).

✓ (ii) Judicial acts (l).—If he acts within his jurisdiction, "no action lies for acts done or words spoken by a Judge in the exercise of his judicial office, although his motive is malicious and the acts or words are not done or spoken in the

(ii) Judicial acts.

(f) 24 Geo. 2, c. 44, s. 6.

(g) For cases on the statute, see Addison, Torts (8th ed.), 992–994.

(h) (1840), 1 M. & G. 775. See, too, *Horsfield v. Brown*, [1932] 1 K. B. 355.

(i) *Keighly v. Bell* (1866), 4 F. & F. 763, 790.

(k) Pollock, Torts, 95–96, favours it. *Contra*, Clerk & Lindsell, Torts, 77. See Dicey, Law of Constitution (9th ed.), 300–309.

(l) The topic is dealt with at length in Winfield, Present Law of Abuse of Legal Procedure (1921), Chap. VII.

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honest exercise of his office" (m). If it were otherwise, the administration of justice would lack one of its essentials,—the independence of the Judges. It is better to take the chance of judicial incompetence, irritability, or irrelevance, than to run the risk of getting a Bench warped by apprehension of the consequences of judgments which ought to be given without fear or favour. Moreover there are, as will be seen later, modes of redress for judicial misconduct even if there is no civil remedy.

This exemption from liability to civil proceedings has been rather infelicitously styled a "privilege". But that might imply that the Judge has a private right to be malicious, whereas its real meaning is that in the public interest it is not desirable to inquire whether acts of this kind are malicious or not. It is rather a right of the public to have the independence of the Judges preserved than a privilege of the Judges themselves (n).

Scope of
exemption

The exemption has a wide scope. It includes (o) not only Judges of the superior Courts, but also those of inferior Courts, such as Quarter Sessions, County Courts, stewards of Courts baron and hundred Courts, Coroners, Vice-Chancellors exercising judicial authority under the charter of a University (p), the Palatine Court of Durham, Censors of the Royal College of Physicians, ecclesiastical Courts, and the Official Receiver, for he is under a statutory duty to make a judicial inquiry. The position of Justices of the Peace has varied. Actions were maintainable against them in the older law, but the tide turned in their favour about the middle of the nineteenth century and they now appear to have judicial immunity. In *Law v. Lewellyn* (q), the magistrate, in allowing the prosecutor to withdraw a charge, said that the Bench regarded the charge as a gross attempt to blackmail and that if the prosecutor found himself in gaol for twelve months it would possibly do him good. The prosecutor sued the magistrate for slander, urging that whatever exemption he might have had as a Judge was destroyed by the fact that what he

(m) *Anderson v. Gorrie*, [1895] 1 Q. B. 668, 671; *Fray v. Blackburn* (1863), 3 B. & S. 576.

(n) Channell, J., in *Bottomley v. Brougham*, [1908] 1 K. B. 584, 586—587.

(o) Authorities are cited in Winfield, *op cit*, 208—211.

(p) *Kemp v. Neville* (1861), 10 C. B. (N.S.) 523; the famous case which led to the abolition of the old "Spinning-house" prison at Cambridge.

(q) [1906] 1 K. B. 487.

had said was uttered after he had allowed the charge to be withdrawn and was therefore outside the course of his judicial duty. This argument was not accepted by the Court of Appeal, who held that it would be lamentable if a magistrate, when he sees that a charge ought never to have been made, were not at liberty to say so.

There is an important distinction between superior and inferior Courts as to proof of jurisdiction. If the plaintiff is suing a Judge of a superior Court for excess of jurisdiction, the burden of proof is on the plaintiff to show that the Judge had not jurisdiction; but the rule is reversed in an action against an inferior Judge, for he must prove that he had jurisdiction (r).

Judicial exemption also applies on grounds of public policy wherever there is an authorised inquiry which, though not before a Court of justice, is before a tribunal which has similar attributes (s). Such is a military Court of Inquiry, and this was so even at the time when it had no power to administer an oath (t); much more is a Court Martial, which perhaps has always had power to do so (u). But a meeting of the London County Council for the purpose of granting music and dancing licences is not a Court for this purpose. "Judicial" has two meanings in this connection. It may refer to the discharge of duties exercisable by a Judge (whether in a law Court or in a private room) or to administrative duties which need not be performed in Court, but in respect of which it is necessary to use a judicial mind,—a mind to determine what is fair and just as to the matters under consideration. Licensing meetings of a county council fall under this second head (a). Bodies like this, such as the Inns of Court and

Includes tribunals of inquiry.

(r) *Peacock v. Bell* (1667), 1 Saund. 73; *Carratt v. Morley* (1841), 1 Q. B. 18; *Trevor v. Wall* (1786), 1 T. R. 151. Cf. Salmond, *Torts*, 614—615.

(s) Lord Esher, M.R., in *Royal Aquarium Society, Ltd. v. Parkinson*, [1892] 1 Q. B. at p. 442. Cited by Collins, M.R., in *Barratt v. Kearns*, [1905] 1 K. B. 504, 510; and approved by the Judicial Committee in *O'Connor v. Woldron*, [1935] A. C. 76.

(t) *Daukins v. Rokeby* (1875), L. R. 7 H. L. 744. The Army Act, 1881 (44 & 45 Vict. c. 58), ss. 70, 72, enables the Court to administer an oath.

(u) This may be inferred from *Daukins v. Rokeby* (1875), L. R. 7 H. L. 744. For other examples, see Winfield, *op. cit.* 209—210.

(a) *Royal Aquarium Society, Ltd. v. Parkinson*, [1892] 1 Q. B. 431, 452. Approved in *O'Connor v. Woldron*, [1935] A. C. 76. See, too, *Smith v. National Meter Co., Ltd.*, [1945] 2 A. E. R. 35.

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And witnesses, etc

Excess of jurisdiction

the General Medical Council, do well enough with such protection as quasi-judicial functions imply (b).

Judicial exemption extends also to witnesses in a Court in the sense that they incur no liability for what they say if it has reference to the inquiry on which they are testifying (c); and the protection afforded to counsel in the discharge of their functions is at least as large (d). Jurors are also free from liability (e).

If there be excess of jurisdiction, the exemption ceases, as where a revising barrister turned a man out of Court on the ground that he had misconducted himself not then, but at a previous sitting of the Court (f), or where a Court Martial tried a person not subject to its jurisdiction (g). It must be observed that the protection accorded to judicial acts cannot be extended to ministerial acts. If a person whose usual functions are judicial refuses to do a ministerial act which is within his province, an action will lie against him. Thus, a refusal by a Presbytery to take on his trials a presentee to a church in Scotland was held by the House of Lords to be actionable (h).

We have said that even where civil remedies are not available against a Judge, the criminal law nevertheless supplies some for acts done whether within jurisdiction or in excess if it (i). The Bench in early times did not lack men with an itching palm, but the standard of judicial integrity has been raised so greatly during the last two centuries that legal proceedings for corruption are unknown now. Nor has it ever been found necessary to take advantage of the legislation now embodied in the Supreme Court of Judicature (Consolidation) Act, 1925, which enables the Crown to

(b) *Fry, L.J.*, [1892] 1 Q. B. at p. 447. For quasi-judicial functions, *supra* post, § 182.

(c) *Seaman v. Netherclift* (1876), 2 C. P. D. 53. The authorities were fully reviewed by Pigot, C.B., in *Kennedy v. Hilliard* (1859), 10 Irish C. L. R. 195.

(d) *Munster v. Lamb* (1853), 11 Q. B. D. 588.

(e) *Bushell's Case* (1670), 6 St. Tr. 909.

(f) *Willis v. Marlachlan* (1876), 1 Ex. D. 376.

(g) *Comyn v. Sabini* (1737), 1 Smith's Leading Cases (13th ed.) 651.

For words spoken by a Judge, perhaps the best test is to grant protection unless it can be clearly shown that no man of ordinary intelligence and judgment could honestly dispute that the words had no connexion with the case in hand. Lord Moncreiff in the Scottish Case of *Primrose v. Waterston* (1902), 4 F. at p. 793.

(h) *Ferguson v. Kinnoull* (1842), 9 Cl. & Fin. 251, 312—313.

(i) For fuller details, see Winfield, *op. cit.*, 212—228.

remove Judges of the High Court and the Court of Appeal on address by both Houses of Parliament (k). And even with their humbler brethren, the Justices of the Peace, there is less need now to have recourse to the statutes which, as Lambard said, "do now and then correct the dulnesse of these Justices, with some strokes of the rodde, or spur" (l). §§ 23, 24.

✓ § 24. Minors.

The history of our law shows some variation in deciding the exact age at which a person reaches full legal capacity, and the tendency was to make it rather an early one in rough times when there was not much to learn. Eventually it was fixed at twenty-one years (m). There is very little in the earlier reports on the capacity of a minor to sue, or his liability to be sued, in tort. Minors.

✓ As to suing he differs in no respect from an adult except that he must sue by his next friend (usually his parent). Capacity to sue. Whether he can maintain an action for harm done to him, before he was born is uncertain. Where the harm done consists in killing one of the relatives defined in the Fatal Accidents Act, 1846 (Lord Campbell's Act), and thereby depriving the child of a reasonable expectation of pecuniary benefit, an action under that Act can be maintained on his behalf when he is born (n). But where the injury is a pre-natal physical one to the child himself we have no English authority really in point, although it is significant that in Dulieu v. White (o), where a child was alleged to have been born an idiot in consequence of nervous shock sustained by the mother while she was enceinte, no claim was made on the child's behalf. In the Irish case of Walker v. G. N. Ry. of Ireland (p), a child was born crippled and deformed after an accident to it *en ventre sa mère* owing to the company's negligence while the mother was travelling on its line. The company was held not liable for the injury to the child.

(k) 15 & 16 Geo. 5, c. 49, s. 12. Heavy penalties are fixed by the Habeas Corpus Act, 1679 (31 Car. 2, c. 2), s. 10, on any Judge who sends a person to gaol abroad, or who, in Vacation time, denies the writ of *habeas corpus* to an applicant.

(l) *Euenarcha* (1614), 370.

(m) Salmond & Winfield, *Contracts*, 135.

(n) *The George and Richard* (1871), L R 3 Ad. & E. 466.

(o) [1901] 2 K. B. 669, 671; 85 L. T. 126 (the better report on this point).

(p) (1890), 28 L. R. Ir. 69

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After a full review of the law, two reasons were given for denying the action: first, the company owed no duty of care towards the child,—not in contract because there was none with respect to the child, nor in tort because the company did not know of the child's existence; secondly, the medical evidence necessary to establish the claim was too uncertain. It would be going too far to say that science "could trace a hare-lip to nervous shock, or a bunch of grapes on the face to fright" (q). Of these reasons the first is the merest technicality in so far as it denies liability in tort, but there is substance in the second. On the other hand, the Supreme Court of Canada has held that an action in tort was maintainable by a child born with club feet two months after an injury had been caused to its mother by the negligence of the defendants (r). I have investigated the topic, including American and Continental law, elsewhere (s) and I need only summarise my conclusions in a footnote (t).

Liability to
be sued.

As to being sued, the law reports are very scanty on liability in pure tort as distinct from cases where tort is implicated with contract, perhaps because minors are not often worth suing. *Dicta* exist to the effect that they

(q) (1890). 28 L. R. Ir. 81.

(r) *Montreal Tramways Co. v. Leveille* (1933), S. C. R. 456; 4 D. L. R. 337.

(s) 8 Cambridge Law Journal (1942), 76—91; reprinted by the courtesy of the editor of the Toronto Law Journal, where the article first appeared: vol. 4 (1942), 278—295.

(t) Three types of tort must be considered:—

(1) Injury to the person. Here we must sharply distinguish (i) the advisability of allowing the action at all; (ii) the possibility of procuring adequate evidence of the causal connexion between the pre-natal injury and the post-natal harm. As to (i), I can see no good reason why an action should not lie. Setting aside analogies from criminal law and the law of property, the chief argument in favour of allowing the action is the injustice of denying it. As to (ii), it depends on the nature of the injury whether this requisite can be fulfilled. Where the injury is of the kind in *R. v. Senior* (1832), 1 Moody C. C. 346, there is no difficulty in criminal law and there should be none in the law of tort; but where the injury occurred some time before birth, the matter is doubtful; thus, in the *Leveille Case* (note (r), ante). I respectfully prefer the opinion of Smith, J., the dissenting Judge, who held the evidence of connexion insufficient.

(2) Injury to property. I think the action ought to be maintainable; here, no such problems would arise with respect to evidence as in (1). In Sir Orlando Bridgman's time, an injunction against waste to the land of such an infant was granted. *Lutterel's Case*, cited in *Hale v. Hale* (1692), Finch, Prec. in Ch., Case No. 51, and in *Musgrave v. Parry* (1715), 2 Vern. 710 (whether waste is a tort, see *post*, § 55).

(3) Injury to reputation. Here, too, an action should be maintainable; e.g., for false imputation of bastardy before the child is born. If it be objected that an unborn child has no reputation, the answer is that reputation is objective, not subjective; it is what other people think of a person, not what he thinks of himself.

"should be bound by actual torts, as trespass, etc., which are vi et contra pacem, yet they shall not be bound by those which sound in deceit" (u), and in particular that they may be charged in trover (a). And it may be that liability which depends on some special mental element like malice or inadvertence can be imputed only to children who are "old enough to know better". This may be inferred from an old case in which a minor aged seventeen years was held liable for defamation because malitia supplet aetatem (b), and the suggestion has common sense in its favour.

§ 24.

Where tort and breach of an alleged contract coincide, troublesome problems have arisen. Subject to certain exceptions, a minor is not liable for his contracts. Suppose that he commits a tort which appears to be a breach of a contract not binding on him, can he be sued in tort? The following statement of the law by Sir Frederick Pollock has secured judicial approval (c).

Tort and contract.

(i) A minor "cannot be sued for a wrong, when the cause of action is in substance ex contractu, or is so directly connected with the contract that the action would be an indirect way of enforcing the contract".

(ii) But if his wrong, "though concerned with the subject-matter of a contract, and such that but for the contract there would have been no opportunity of committing it, is nevertheless independent of the contract in the sense of not being an act of the kind contemplated by it", then he is liable.

Rule (i) was established in Johnson v. Pye (1665) (d), where a minor of over twenty years induced the plaintiff to lend him £300 by lies, and was held not liable in an action for deceit. It was said that if minors were made liable on their contracts by means of actions in tort "all the infants in England will be ruined". So, too, where a minor hired a

(u) Johnson v. Pye (1665), 1 Sid. 258; 1 Keb. 913. The dictum in Anderson v. Warde (1554), 1 Dyer, 104, 104 b, is much too sweeping.

(a) Smally v. Smally (1700), 1 Eq. Ca. Abr. 6.

(b) Hoddsman v. Grissel (1607), Noy 129. Salmond, Torts, § 15 (1), infers it also from decisions in which children have recovered damages for injuries from "attractive traps" although their conduct would have been contributory negligence in an adult.

(c) Contract (12th ed.), 62-63: Kennedy, L.J., in Leslie v. Sheill, [1914] 3 K. B. 607, 620; Atkin, J., in Fawcett v. Smethurst (1915), 84 L. J. K. B. 473.

(d) 1 Sid. 258; 1 Keble 913.

§ 24. horse and injured it by overriding it, he was held not liable (e).

Rule (ii) is illustrated by *Burnard v. Haggis* (f). The defendant, an undergraduate of Trinity College, Cambridge, aged nineteen years, was held liable in the following circumstances. He hired from the plaintiff a mare for riding on the express stipulation that she was not to be used for "jumping or larking". He nevertheless lent the mare to a friend who, while they were galloping about fields in the neighbourhood of Cambridge, tried to jump her over a fence, on which she was staked; she died from the wound. The defendant's conduct was, as Willes, J., said (g), "as much a trespass, notwithstanding the hiring for another purpose, as if, without any hiring at all, the defendant had gone into a field and taken the mare out and hunted her and killed her. It was a bare trespass, not within the object and purpose of the hiring. It was not even an excess. It was doing an act towards the mare which was altogether forbidden by the owner" (h).

So far as it goes, the law seems to be sound here, although its application is sometimes difficult. But it has unfortunately condoned some pretty pieces of rascality on the part of minors who have procured money or goods by lying about their age, and who have escaped civil liability. Quite possibly they were amenable to the criminal law, but that is somewhat clumsy and unprofitable for the defrauded party to set in motion. Something like the Roman law *scriptio censoria* which branded the profligate or the dishonest, seems to be needed here.

Liability of parent.

A parent or guardian (i) is not in general liable for the torts of a child; but to this there are two exceptions. First, where the child is employed by his parent and commits a tort in the course of his employment, the parent is vicariously responsible just as he would be for the tort of any other

(e) *Jennings v. Rundall* (1799). 8 T. R. 335. More recent cases are *Walley v. Holt* (1876), 35 L. T. 631, and *Leslie v. Sheil and Fawcett v. Smethurst*, note (c), *ante*.

(f) (1863), 14 C. B. (N.S.) 45 (W. Cases, 36).

(g) 14 C. B. (N.S.) 53.

(h) So, too, where the minor was the bailee of goods which, in contravention of the terms of the bailment, he transferred to another person, he was held liable in detinue: *Ballett v. Mingay*, [1943] K. B. 281 (noted in 59 L. Q. R. (1943), 107).

(i) Note in this connexion that school authorities are under no greater duty than that of a reasonably careful parent: *Ricketts v. Erith B.C.*, [1943] 2 A. E. R. 629, 631.

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servant of his. In Moon v. Towers (k), the defendant employed his son, aged seventeen or eighteen years, as treasurer at his theatre. The son wrongfully gave into custody the plaintiff, another servant, on a criminal charge. It was held that the defendant was not liable to an action for false imprisonment, for he had neither authorised nor ratified his son's act and apparently it was not done in the course of employment (l). Secondly, the parent will be liable if the child's tort were due to the parent's negligent control of the child in respect of the act that caused the injury, or if the parent expressly authorised the commission of the tort, or possibly if he ratified the child's act. Thus, where a father gave his boy, about fifteen years old, an air-gun and allowed him to retain it after he had smashed a neighbour's window with it, he was held liable for the boy's tort in injuring the eye of another boy with the gun (m). But if a boy has been carefully trained in the use of a sporting gun and ordinarily exercises great care with it, presumably the father will not be liable for an accident occurring by the boy's negligence (n). Nor will he be liable to one who is bitten by a dog which belongs to his daughter who is old enough (e.g., seventeen years) to be able to exercise control over it, and this is so even if the father knows of the dog's ferocious temper (o).

Children who are injured by "attractive traps" on the highway or on the land of another are in a better position for suing than are adults in the like circumstances. But the law as to this must be postponed to the head of duties with respect to dangerous premises, *post*, § 167, for both the text-books and the reports (p) are emphatic that this has nothing to do with status.

§ 25. Married women.

Married women.

Until 1935, the English law as to wives presented a rather barbarous hotch-potch of humiliating disabilities and scandalous

(k) (1860), 8 C. B. (N.S.) 611.

(l) There was some doubt whether, even if there had been ratification, the defendant would have been liable.

(m) *Bebee v. Sales* (1916), 32 T. L. R. 413. See, too, the Scottish Case, *Brown v. Fulton* (1881), 9 R. (Court of Sess.) 36.

(n) So a Manitoba decision: *Turner v. Snider* (1906), 16 Man. L.R. 97.

(o) *North v. Wood*, [1914] 1 K. B. 629.

(p) Lord Sumner, in *Glasgow Corporation v. Taylor*, [1922] 1 A. C. at p. 67; Farwell, L.J., in *Latham v. Johnson*, [1913] 1 K. B. at p. 407.

§ 25. immunities. The cause of this was the sharp difference between the harsh policy of the Common Law and the benignant attitude of Equity towards the married woman. If she was the spoiled child of Equity, she was also the Cinderella of the Common Law. In the law of property Equity won the day, for its main doctrine was embodied in various Married Women's Property Acts. At present the Law Reform (Married Women and Tortfeasors) Act, 1935, puts married women in almost exactly the same position as their unmarried sisters (q).

In the law of tort there was neither disability nor immunity at Common Law. She could sue and be sued, but her husband had to be joined with her as she had no procedural existence apart from him. The necessity for joining him was abolished by the Married Women's Property Act, 1882 (r).

But this simple statement of the law was subject to several qualifications and additions.

Formerly not
liable beyond
separate
property.

(1) Extent of liability.—A married woman was not liable beyond her separate property (s). The Law Reform (Married Women and Tortfeasors) Act, 1935 (t), abolished the word "separate" in connexion with her property and, subject to what is stated below, puts her in the same position as a *feme sole* with respect to property. Judgment against her is not, as it used to be, limited to her separate property (u).

Actions
between
husband
and wife.

(2) Actions between spouses.—Actions in tort between husband and wife were not possible at Common Law owing to the fiction that they were one flesh; a better and more modern reason is that such litigation is "unseemly, distressing and embittering" (a). The Married Women's Property Act, 1882, s. 12, retained this rule (b), except as to actions by the wife for the protection and security of her separate property, and both the rule and its exception are

(q) 25 & 26 Geo. 5, c. 30, Part I. For the history of the law down to 1879, see C. S. Kenny, *History of the Law of Married Women's Property*.

(r) 45 & 46 Vict. c. 75, s. 1 (2).

(s) *Ibid.*

(t) 25 & 26 Geo. 5, c. 30, s. 1.

(u) *Scott v. Morley* (1887), 20 Q. B. D. 120. Act of 1935, s. 1 (d).

(a) McCardie, J., in *Gottliffe v. Edleston*, [1930] 2 K. B. 378, 392.

(b) As to whether an action for the recovery of land is, in this connexion, an action in tort, see the *dicta* in *Pargeter v. Pargeter*, [1946] 1 A. E. R., at pp. 571—572.

unaltered by the Act of 1935, except that we do not use the word "separate". No exception is made in the husband's favour and therefore he cannot obtain an injunction against his wife to prevent her from pledging his credit (c). ✓

§ 26.

In applying the exception in favour of the wife the Courts have been obliged to ascertain the meaning of "tort". It has been held that she can sue her husband in detinue for the return of goods forming part of her separate property (d); and that the Act has not altered the rule that she can sue him for rescission of a deed procured by his fraud, for such an action is not one in tort as it has nothing to do with a claim for damages (e).

✓ The singular case of Ralston v. Ralston (f) raised the question whether a wife can sue her husband for perpetrating a libel on her which affects a business carried on by her apart from him. Mr. and Mrs. Ralston separated, and she set up business as a garage proprietor. In 1929, she saw in a churchyard near her husband's residence a tombstone inscribed, "In loving memory of Jennie, the dearly beloved wife of W. R. Crawshay Ralston . . . Died 20th May, 1916". Her husband was the Ralston named and he had caused the inscription to Jennie (who was not his wife) to be made. Mrs. Ralston sued Mr. Ralston for libel, the innuendo being that the inscription imputed adultery to Mrs. Ralston, as the tombstone described another woman as Mr. Ralston's wife in 1916. Macnaghten, J., gave judgment for the husband; the ground of his decision was that chastity is not a necessary qualification for the management or ownership of a garage and that there was therefore no interference with her separate property (g). This appears to leave it open whether the decision would have been otherwise if the wife's business had been one in which chastity is a requisite, e.g., the headship of a girls' school (h). ✓

(c) *Webster v. Webster*, [1916] 1 K. B. 714.

(d) *Larner v. Larner*, [1905] 2 K. B. 539. As to interpleader proceedings, see *De la Rue v. Hernue, etc., Ltd.*, [1936] 2 K. B. 165.

(e) *Hulton v. Hulton*, [1917] 1 K. B. 813.

(f) [1930] 2 K. B. 238.

(g) He relied on *Tinkley v. Tinkley* (1909), 25 T. L. R. 264; but that decision was not on libel, but on malicious prosecution and false imprisonment.

(h) See the query of Brett, J., in *Summers v. City Bank* (1874), L. R. 9 C. P. 580, 583-584. In *Chant v. Read*, [1939] 2 K. B. 346, an action on behalf of the wife's estate against the husband for negligence which caused her death and consequent loss of expectation of life was held not to be for

§ 28.

A right of action in tort for personal injuries which a wife had against her husband before she married him is not "separate property" (now "property") within the exception to the Act, and therefore she cannot sue him after the marriage in respect of that tort. In *Gottliffe v. Edelston* (i), Harry, who was not then married to Esther, injured her by negligent driving of a car in which she was a passenger. She issued a writ in an action in tort against him and three months after this they married each other. It was held that the action was not maintainable, because Esther's right of action was not part of her "separate property" within the Married Women's Property Act, 1882, s. 12 (*ante*, p. 100). One would have thought that the short reason why she could not recover was because she had no separate property to be protected. The right of action for injuries was not separate property before she married, because "separate property" did not exist apart from marriage; and the right of action did not become separate property when she did marry because, being an action in tort, it had ceased to exist then on the plain wording of the Married Women's Property Act, 1882, s. 12. An equally short reason would have been that, even if her right of action in tort was separate property, she was not suing for "protection" of it, for nobody had interfered with her suing the action. How can you "protect" what is not assailed? McCardie, J., however, preferred to rest his decision on the ground that her right of action in tort was not a "thing in action" so as to form part of her separate property within section 12, although in section 24 "property" expressly includes "a thing in action".

Exclusion of husband from wife's house.

While there is no doubt that a third person who enters a house which, although it is the matrimonial home, is the property of the wife, can be sued for trespass—for it would be scandalous that a profligate husband living apart from his wife should be able to empower dissolute friends of his to force their way into her property (*k*)—yet it has been doubted whether the wife can exclude the husband himself

the protection of her property and therefore not to be maintainable. In *Smuth v. Moss*, [1940] 1 K. B. 424, it was held that if one spouse, acting as agent of a third party, tortiously injures the other spouse, the third party can be sued although the first spouse cannot: cf. 56 L. Q. R. (1940), 301–302.

(i) [1930] 2 K. B. 378.

(k) *Weldon v. De Bathe* (1884), 14 Q. B. D. 339, 343.

from such entry. She can certainly do so if they are living apart and his conduct is such that he has forfeited the right to *consortium*, e.g., where his intemperance and cruelty injure the prosperity of a business which she is carrying on in the house which is her property (l). Where, however, he has not forfeited his right to *consortium* and is not acting in a way detrimental to her property, the better opinion is that she cannot prevent his entry, because "it is the duty of husband and wife to live together, and if one or other wilfully absents himself, that is a matrimonial offence" (m). ✓

Divorce (n) or (apparently) death of either spouse will not enable either party in the one case, or the survivor in the other, to sue or be sued for a tort committed by the other during marriage. At one time if the parties were judicially separated they could sue each other in tort, but this appears to have been abolished by the Act of 1935 (o). ✓

Although no action in tort lies in general as between husband and wife, the Married Women's Property Act, 1882, s. 17, enables the Courts therein mentioned to decide in a summary way disputes between them as to the title to, or possession of, property.

The Act of 1882 (p) as amended by the Act of 1935 (q) also makes the wife liable for her ante-nuptial torts committed against third parties. ✓

(3) Husband's liability for wife's torts.—The Act of 1882 made him liable for his wife's pre-nuptial torts to the extent of any property which he acquired through her (r). The Act of 1935 abolishes this liability altogether (s). ✓

Husband not liable for wife's torts.

As for torts which she committed during marriage, he was liable for them (t), unless the tort were directly connected with a contract which she had made with the injured party and were the means of effecting the contract and were parcel of the same transaction. This oppressive rule (together with

(l) *Symonds v. Hallett* (1883), 24 Ch. D. 346; *Shipman v. Shipman*, [1924] 2 Ch. 140.

(m) *Per* Atkin, L.J., in *Shipman v. Shipman*, [1924] 2 Ch. at p. 146. For doubts expressed in earlier cases, see decisions cited in last note.

(n) *Phillips v. Barnet* (1876), 1 Q. B. D. 436.

(o) S. 5 (1), and First Schedule; a probably unintended effect in *Dr. Stallybrass's* opinion: *Salmond, Torts*, p. 67, note (s).

(p) S. 13.

(q) Schedule II.

(r) S. 14.

(s) S. 3.

(t) So, of course, was she to the extent of her separate property.

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the exception to it) was upheld by a bare majority of the House of Lords in *Edwards v. Porter* (u). The rule existed at Common Law long before the Act of 1882; and at a time when the husband was supposed to be his wife's guardian and acquired all her property it was intelligible and not unfair. But when she had become practically independent it was an archaic anomaly. The result was that it might well be less expensive for a man to keep a dog with a savage temper than to marry a wife with a venomous tongue; he could kill the animal, he could not even lock up the woman, and while he was not liable for the dog's bites unless he knew of its evil disposition, ignorance of his wife's vices was no excuse (a).

The Act of 1935 happily abolished the rule by providing that a husband shall not, merely because he is a husband, be liable in respect of any tort committed by his wife whether before or during marriage (b), but he may, of course, be liable as a joint tortfeasor with his wife if in fact he was one (c).

Until the Act of 1935 abolished "separate" property, the party injured by the wife's tort could elect to sue her alone, or both her and her husband jointly at Common Law or under the Act of 1882. The Act, by putting her on the same footing as a feme sole with respect both to her property and to her capacity to sue and be sued, has made it necessary and sufficient to sue her alone (d).

Corporations.

§ 26. Corporations.

A corporation is an artificial person created by the law. It may come into existence either by the Common Law, or by royal charter, or by parliamentary authority, or by prescription or by custom. Whatever their origin may be, the characteristics common to most corporations are a distinctive name, a common seal and perpetuity of existence. This

(u) [1925] A. C. 1. Earlier authorities are discussed there.

(a) *Newton v. Hardy* (1933), 149 L. T. 165, showed the doctrine in an absurd aspect. See, too, *Greenwood v. Martins Bank, Ltd.*, [1933] A. C. 51.

(b) S. 3. The Act is retrospective except as to an action commenced before the Act: *Barber v. Pigden*, [1937] 1 K. B. 664.

(c) S. 4 (2) (c).

(d) S. 1. The earlier law on this procedural point will be found in *Lush, Husband and Wife* (4th ed., 1933), 251-253; *Beaumont v. Kaye*, [1904] 1 K. B. 292; *Ferguson v. Clayworth* (1844), 5 Q. B. 269; *Wainford v. Heyl* (1875), L. R. 20 Eq. 321.

existence is quite independent of the human beings who are members of the corporation. Fellows of a college and shareholders of a railway company may perish, but the college and the railway company still continue. A conspicuous classification of corporations is that into sole and aggregate. A corporation sole consists of one person and his successors, such as the King, a bishop, a parson, the Public Trustee, and the Treasury Solicitor. The office of each of these persons will persist whether the particular holder of it is alive or dead. A corporation aggregate consists of several persons, such as the governing body of a college, or a limited company (e).

§ 26.

✧ (1) Capacity to sue in tort.—A corporation can sue for torts committed against it, but there are certain torts which it is impossible to commit against a corporation. Such are assault and personal defamation. Thus, a corporation cannot sue for libel a person who charges it with bribery and corruption although the individual members of it might be able to do so (f); but if a libel or slander affects the management of its trade or business, then the corporation itself can sue; as where the workmen's cottages of a colliery company were falsely described in a newspaper as highly insanitary (g).

(1) Capacity to sue.

✓ (2) Liability to be sued in tort.—A distinction must be taken between torts which are *intra vires* and torts which are *ultra vires*. Many corporations are expressly limited by the terms of their incorporation as to the acts which they may lawfully do. If they observe those restrictions they are said to be acting *intra vires*, and this is still the case even when they commit a tort, provided it is done as an incident of some act which falls within their powers. If it is not connected in this way with what they are lawfully entitled to do, the tort is said to be *ultra vires*.)

(2) Liability.

✓ (i) Liability for intra vires torts.—If the tort is committed by a servant or other agent of the corporation acting

(i) Intra vires torts.

(e) Salmond & Winfield, Contracts, § 137.

(f) *Manchester (Mayor of) v. Williams*, [1891] 1 Q. B. 94. This decision was considered to be wrong by Oliver, J., in *Willis v. Brooks*, [1947] 1 A. E. R. 191 (the dictum was obiter, for the plaintiff was a trade union, not a corporation).

(g) *South Hetton Coal Co., Ltd. v. N.-E. News Association, Ltd.*, [1894] 1 Q. B. 133; *D. & L. Caterers, Ltd. v. D'Ajou*, [1945] K. B. 364; and a limited company can still sue even if the business is *ultra vires*: *National Telephone Co. v. Constables of St. Peter Port*, [1900] A. C. 317.

§ 26. in the course of his employment, then the corporation is liable on exactly the same principle that any employer is vicariously responsible in the like circumstances. In time past there were procedural difficulties in the way of suing the corporation (h), but these have long since disappeared. In 1812, it was held that a corporation could be sued in trover (i), in 1842 in trespass (k), in 1858 for libel (l), and many other decisions have made it clear that wherever it is possible for a corporation to commit a tort at all, it can be sued (m).

In one class of torts there was a difficulty which has been dispelled in only comparatively recent times,—those which require malice in the sense of actual ill-will such as malicious prosecution. It was urged that a corporation had no mind and that therefore malice could not be imputed to it. But this was a needless and fallacious metaphysical subtlety, for the reason why a corporation is liable, if at all, for tort is because it is responsible (like any other employer) for the torts of its servants committed in the course of their employment, and they have the requisite mental equipment even if the corporation has none (n).

(ii) *Ultra vires* torts.

(ii) Ultra vires torts.—Here it is certain that, whatever the law may be where the corporation has expressly authorised the commission of an *ultra vires* tort, (no authority to the servant or agent to commit such a tort can be implied.) (In *Poulton v. L. & S. W. Ry.* (o) the defendants' station-master wrongfully detained the plaintiff because he refused to pay the fare of his horse.) The power to detain in such circumstances was quite outside the defendants' powers. Held, they were not liable, for, in the opinion of Mellor and Shee, JJ., no authority could be implied to do such an act (p).

(But if the *ultra vires* tort is committed in pursuance of

(h) Pollock, Torts, 52, note (u); Holdsworth, H. E. L., iii, 488—489.

(i) *Yarborough v. Bank of England*, 16 East 6.

(k) *Maund v. Monmouthshire Canal Co.*, 4 Man. & G. 452.

(l) *Whitfield v. S. E. Ry.*, E. B. & E. 115.

(m) 8 Halsbury's Laws of England (2nd ed.), §§ 174—177.

(n) *Cornford v. Carlton Bank, Ltd.*, [1899] 1 Q. B. 392; [1900] 1 Q. B. 22; *Citizens' Life Assurance Co., Ltd. v. Brown*, [1904] A. C. 423, 426.

(o) (1867), L. R. 2 Q. B. 534.

(p) *Ibid.*, 540—541. *Poulton's Case* was followed in *Ormiston v. G. W. Ry.*, [1917] 1 K. B. 598 (railway porter by mistake arrested a first-class passenger under the impression that he was entitled to travel only third class; defendants, who had no power to authorise arrest, were held not liable).

of the corporation it is doubtful
 There seems to be no direct decision on
 the text-books are not in agreement (q).

are to suggest that, on principle, the corporation
 is liable. It seems to me that there was no reason
 for maintaining the doctrine of *ultra vires* in this connexion
 because the liability of the corporation is completely and
 explicable without recourse to it. The principles,
 only principles, which need have been applied are
 If the corporation expressly authorised X to commit
 a tort, it should be liable (together with X) just as any
 natural tortfeasor would be liable. The fact that one of
 the tortfeasors is a corporation and not an ordinary
 individual is irrelevant; nor is there any need to describe the
 nature of vicarious liability. No doubt vicarious
 liability is in one sense a species of joint liability; but it is
 peculiar in that A (the employer of X), who has neither
 committed nor connived at X's tort, may be liable jointly
 with X, *provided the tort is within the scope of X's employ-*
ment. But this italicised proviso is inapplicable to that
 species of joint liability which arises from A's express
 instructions to X to commit a tort. In that case it is
 immaterial—indeed it is senseless—to talk about “scope of
 employment”. It is quite true that a corporation can act
 only through servants or agents, but it is a fallacy to argue
 that *because* an employer is vicariously responsible for the
 torts of his servant *therefore* he and the servant can never be
 liable as ordinary joint tortfeasors. If I order my butler to

(q) Some remarks by Blackburn, J., in *Poulton's Case* (*supra*), at p. 540, are thought to be against liability. In *Mill v. Hawker* (1874), L. R. 9 Ex. 309, 317, 323—324; L. R. 10 Ex. 92, 97, there are conflicting *obiter dicta*. In *Ormiston v. G. W. Ry.*, [1917] 1 K. B. 598, 602, an *obiter dictum* favours liability; in *Campbell v. Paddington Corporation*, [1911] 1 K. B. 869, 875, 878 (W. Cases 37), both Judges took this view, but as Professor A. L. Goodhart points out, it is not certain whether the tort alleged there was *ultra vires* or *intra vires* (Essays in Jurisprudence, 106—107). In *Mackenzie-Kennedy v. Air Council*, [1927] 2 K. B. 517, 523, 533, the *dicta* are conflicting.

Of the text-books, Brice, *Ultra Vires* (3rd ed., 1893), 435—442, regards the corporation as liable; so does Salmond, *Torts*, § 13 (3). H. A. Street, *Ultra Vires* (1930), 259—270, thinks there is liability “provided that the act is not absolutely *ultra vires*”. Clerk & Lindsell, *Torts*, 96, are against liability. So is Professor Goodhart, *op. cit.*, Chap. V; the learned author's argument must be closely studied, and it is with much regret that I am compelled to dissent from it. See, too, Dr. Stallybrass, in *Journal of Comparative Legislation* (1931), vol. xiii, 141—144.

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assault you, he and I are ordinary
no question of vicarious liability. A
head-porter to assault you, the position would
same (r).

If the corporation did not expressly authorise X to
the tort, it is liable if X were its employee acting within
scope of his employment, and it is not liable otherwise.

Thus the doctrines of joint liability of tortfeasors
vicarious responsibility in tort would cover the whole

Unfortunately, in a few *dicta* in the reports etc.
reference has been made to *ultra vires* and perhaps
implication in other *dicta*. The argument based on
is that any tort is *ultra vires* the corporation and therefore
it cannot expressly authorise the commission of
at all. This is a confusion of *ultra vires* in the context of
corporations with their liability in tort; and it further
proceeds on the fallacy that, because A is forbidden by law to
do a thing, A can never be punished if he does it. Alternatively,
the argument proceeds upon another fallacy,—that
if A has no legal capacity to do an act, he can never be made
legally liable if he does it. That is not so. A minor has no
legal capacity to make certain contracts, but he may still
be criminally liable for obtaining credit by fraud. Those
who allege that the doctrine of *ultra vires* applies to a
corporation's liability in tort beg the question by assuming
the very thing that they have to prove, i.e., that the doctrine
has never been applied to corporations in anything except
the law of contract and of property (s).

(r) Professor Goodhart's criticism of this in 51 L. Q. R. 129, would be
more in point if it did not proceed upon the assumption that a corporation
is regarded in English law as a "fictitious" person (see next note); and in
7 Modern Law Review. 87, he overlooks the fact that an order for the
forcible expulsion of a person from college premises may, in some circumstances,
be unlawful.

(s) Discussion of the problem of liability for *ultra vires* torts would not
be exhausted without considering what effect the varying theories that a
corporation is (i) a fictitious person, or (ii) a real person, might have upon
it. But as our Common Law has committed itself to neither theory, such
discussion would be out of place here (Pollock, *Essays in the Law* (1932),
151—179. See, too, Viscount Haldane, L.C., and Lord Dunedin in
Lennard's Carrying Co., Ltd. v. Asiatic Petroleum Co., Ltd., [1915]
A. C. 705, 713, 715); all that English Law admits is that a corporation is
an artificial person, and "artificial" is not the same thing as "fictitious".
A wooden leg may be artificial; it is not a fiction.

§ 27. Lunatics (t).

§ 27.

Lunatics.

English law is destitute of any actual decision as to the tortious liability of a lunatic. Sir Matthew Hale thought that *dementia* was one of several other forms of incapacity which might exempt a person from criminal liability, but which ordinarily do not excuse him from civil liability, for that "is not by way of penalty, but a satisfaction for damage done to the party" (u); and there are *dicta* in the older cases which regard lunacy as no defence (a), but they are of little use nowadays, for liability for trespass in its old wide sense was stern and very little was known about the pathological side of insanity. More to the purpose is a *dictum* of Lord Esher, M.R., in 1892 (b), that a lunatic is liable unless the disease of his mind is so great that he cannot understand the nature and consequences of his act.

As the matter is still at large, it is worth while referring to the law of some other countries although, of course, decisions there can have only persuasive authority here. In Scots law lunacy is said to be a complete defence (c). Modern decisions in Canada (d) and New Zealand (e) have made lunacy no defence to an action for assault. In the United States of America there is a fair number of cases on the subject and the trend of authority seems to be represented by *Williams v. Hays* (f), a New York decision, in which the defendant, a co-owner of a ship, was held liable to his co-owners for negligent wrecking of the ship owing to his insanity. It was laid down that an insane person is just as responsible for his torts as a sane person, except perhaps for those in which malice, and therefore intention, actual or imputed, is necessary. Various reasons were suggested,

(t) W. G. H. Cook, *Insanity* (1921), Chap. II, deals with the topic.

(u) 1 Hist. of Pleas of Crown (ed. 1778), 15—16. So, too, in effect Bacon (Spedding's ed. of his works, vii, 348).

(a) E.g., *Weaver v. Ward* (1616), Hob. 134.

(b) *Hanbury v. Hanbury*, 8 T. L. R. 559, 569; *Emmens v. Pottle* (1885), 16 Q. B. D. 354, 356. Cf. Kelly, C.B., in *Mordaunt v. Mordaunt* (1870), L. R. 2 P. & D. 103, 142.

(c) Glegg, *Reparation* (3rd ed., 1939), 96.

(d) *Taggard v. Innes* (1862), 12 C. P. 77.

(e) *Donaghy v. Brennan* (1901), 19 N. Z. L. R. 289.

(f) (1894), 42 Am. St. Rep. 743. Much of the statement of the law in 32 Corpus Juris (1923), 749—750, is based upon it. In 1848, the Supreme Court of the U.S.A. held a lunatic Justice of the Peace to be liable for wrongfully causing a person to be imprisoned: *Krom v. Schoonmaker*, 3 Barb. 647.

§§ 27, 28. for the rule: (1) Where one of two innocent persons must bear a loss, the loss must fall on him who did the act. (2) Public policy, which requires the rule in order to induce his relatives to keep the lunatic under restraint, and also in order to prevent tortfeasors from feigning insanity. (3) The lunatic must bear the loss occasioned by his torts, as he bears his other misfortunes (g).

None of these reasons is convincing. { The third seems to be the best, but that would be a ground for making a lunatic liable for *all* his torts. } Whether that ought to be the law is matter for serious consideration, but there is much to be said both for and against the proposition and it would be out of place to enlarge upon it here.

At any rate, Lord Esher's *dictum* appears to be more workable than the rule in *Williams v. Hays*, which leaves it uncertain whether "malice" means "intention" or "spite". If it signifies "intention", it leads to the curious conclusion that while a lunatic is liable for his negligent wrongs, he is probably not liable for such as are intentional (h).

Convicts.

§ 28. Convicts.

(At Common Law, a convicted felon could not sue for torts to his property, for he had none; it was forfeited to the Crown.) Forfeiture for felony was abolished by the Forfeiture Act, 1870 (i), which provides that a convicted felon or traitor, who has been sentenced to death or penal servitude, cannot, while his sentence is in force, sue "for the recovery of any property, debt, or damage whatsoever" unless he is released on ticket-of-leave (k). It will be noticed that the disability has no application to felons who are sentenced to mere imprisonment as distinct from penal servitude. In time past, conviction for offences less in gravity than treason

(g) Restatement of Torts, vol. 4, p. 468, makes liability turn upon the presence of a particular state of mind where that is an essential of the tort concerned.

(h) My learned friend, Dr. Lipstein, has thus summarised the law of the leading Continental countries: (1) a lunatic is not liable in tort, but (2) in several systems he is bound to pay damages if all the circumstances with respect to his needs and obligations make it equitable that he should do so. The following are only a few of the references which Dr. Lipstein placed at my disposal: Germany, BGB, § § 827, 829; Austria, aBGB, § § 1308, 1310; France, *Colin et Capitant*, II, 374, no. 1; Mazeaud, *Responsabilité Civile* (1934), I, § § 448—475.

(i) 33 & 34 Vict. c. 23.

(k) Ss. 8, 30.

or felony seems to have occasionally involved forfeiture (l), §§ 28, 29. but no such instance now survives. Even where the disability to sue applies, it is subject to two qualifications. The felon's property vests in an administrator or *interim* curator, who can sue on behalf of the convict for injury thereto (m). And it may be inferred that for a personal injury the convict himself can sue. It was recognised so far back as the sixteenth century that such a cause of action was not forfeited (n), and there is no reason to suppose that the Act of 1870 has altered this: for, although it provides that the convict cannot sue for the recovery of any "damage" whatsoever, yet its main purpose was to relieve him from forfeiture of his property, and not to wipe out the remedy which he already had for torts to the person.

§ 29. Aliens (o).

Aliens.

A friendly alien as such is now under no disability and has no immunity. But the fact that a person, whether British or alien, is injured abroad may materially affect his right of action here; but this will be treated under the heading "Locality of Tort" (p).

Friendly aliens have had a chequered career in the English law Courts. The early Common Law had little application to them, for when they came here it was generally under royal charters and their business took them into boroughs created by royal charter. Thus began a conflict which veered this way and that for some centuries. The burghers did not want aliens, because they filched away their trade. The King and nobles on the whole favoured them, because they lent money, kept prices down and paid for royal favours (q). Littleton in his *Tenures* (c. A.D. 1481—1482) denies any action, real or personal, to an alien born out of allegiance to the King (r). Coke, in his commentary upon Littleton (A.D. 1628), qualifies this by saying that "an alien

(l) Viner Abr. (2nd ed.), "Forfeiture" (W).

(m) 33 & 34 Viet. c. 23, ss. 10, 24.

(n) Staundford, *Plces del Coron.* 188a.

(o) Foreign sovereigns and ambassadors are more appropriately dealt with in books on International Law. The law of tort relating to them is epitomised in Salmond, *Torts*, § 12 (1); Clerk & Lindsell, *Torts*, 79—81.

(p) *Post*, § 47.

(q) Pollock & Maitland, *History of English Law* (2nd ed. 1898), 1, 464—466.

(r) S. 98.

§§ 29, 30.

that is in league [with the King] shall maintain personal actions . . . but he cannot maintain either real or mixt actions" (s). Real actions were practically concerned with the recovery of land, and as an alien could hold no land, he could not sue for the loss of it, nor was this disability extinct until the Naturalization Act, 1870 (t).

An alien enemy is one whose State or sovereign is at war with the sovereign of England, or one who, whatever his nationality, is voluntarily resident or carries on business in an enemy's country. But it is possible for a subject of an enemy State, who is neither residing nor carrying on business in an enemy's country, not to be an alien enemy with regard to civil rights (u). As thus defined, an alien enemy, unless he be within the realm by the licence of the King, cannot sue in the King's Courts. He can, however, be sued and can defend the action and, if the decision goes against him, he can appeal (a).

Trade
unions.

§ 30. Trade unions.

The law relating to labour has been strongly coloured by the political conflict between capital and labour and the law of tort in particular has not escaped this tinge in its relation to trade unions. Trade unions have passed historically from being criminal associations to acquiring full legal recognition, and in the early part of the present century they were raised to a privileged position. The House of Lords held, in 1901, that an action in tort could be brought against a trade union in its registered name (b). This decision was very unpopular with the Labour party and the law was changed by the Trade

(s) Co. Litt. 129b.

(t) 33 Viet. c. 14. For the history of the topic, see Holdsworth, H. E. L., ix, 72-99.

(u) 1 Halsbury's Laws of England (2nd ed.) § 754.

(a) *Porter v. Freudenberg*, [1915] 1 K. B. 857. For further details as to alien enemies, see Sir Arnold McNair, *Legal Effects of War* (2nd ed., 1944), Chaps. 2-5; W. E. Davies, *Aliens* (1931), Chap. XI; and, as to their position during the World War, 1939-1945, Butterworths' *Emergency Legislation Service*. An alien enemy interned in England cannot maintain a claim for *habeas corpus*; *R. v. Bottrill*, [1947] 1 K. B. 41; it is doubtful whether he can sue for false imprisonment on the ground that statutory powers have been exceeded by those who intern him; *Hirsch v. Somervell*, [1916] 2 A. E. R. 430. *Qu.* whether an alien enemy resident in England without the licence of the King can sue in tort? I incline to agree with Mr. P. H. T. Rogers, *Effect of War on Contract*, 127-128, that he can sue; 9 Camb. Law Journal, 129-130.

(b) *Taff Vale Ry. v. Amalgamated Society of Railway Servants*, [1901] A. C. 426.

Disputes Act, 1906, which provided that "an action against a trade union, whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any court" (c).

Judicial opinions varied as to the political expediency of this enactment, but it would be out of place to discuss that side of it here (d). In interpreting this section of it, it has been held that the immunity applies to any tort and is not limited to such as are committed in contemplation or furtherance of a trade dispute (e). Trade union officials and members are not personally exempted from actions in tort; all that the section does is to protect the trade union funds against such litigation (f).

The general strike of 1926 (g) led to amendments of the Act of 1906. The Trade Disputes and Trade Unions Act, 1927, deprived a trade union of its immunities if a strike (or lock-out) (1) had any object other than the furtherance of a trade dispute within the trade or industry in which the strikers (or employers locking-out) were engaged, and (2) was a strike or lock-out designed or calculated to coerce the Government either directly or by inflicting hardship upon the community (h). The Act was repealed by the Trade Disputes and Trade Unions Act, 1946 (i).

A trade union can sue in its registered name (k).

(c) 6 Edw. 7, c. 47, s. 4.

(d) *E.g.*, Fairwell, L.J., in *Conway v. Wade*, [1908] 2 K. B. 844, 856; "the Legislature cannot make evil good, but it can make it not actionable". But Lord Macnaghten thought that there was "nothing absurd in the notion of an association or body enjoying immunity from actions at law": *Vacher & Sons, Ltd. v. London Society of Compositors*, [1913] A. C. 107, 118. See, too, Lord Loreburn, in [1909] A. C. at p. 510. For an unbiased account of the origin of the Act, Dr. Stallybrass recommends Lord Asquith's *Industrial Problems and Disputes*, 88-96.

(e) *Vacher's Case* (last note).

(f) *Bussy v. Amalgamated Society of Railway Servants* (1908), 24 T. L. R. 437.

(g) The strike itself was held to be illegal: *National Sailors', etc., Union v. Reed*, [1926] Ch. 536; but it is difficult to see why: Professor A. L. Goodhart, *Essays in Jurisprudence*, Chap. XI.

(h) 17 & 18 Geo. 5, c. 22, s. 1 (1). For the meaning of acts done "in furtherance of" a trade dispute, see *R. v. Tearse*, [1945] 1 K. B. 1.

(i) 9 & 10 Geo. 6, c. 52.

(k) *National Union of Workers v. Gillian*, [1946] K. B. 81; *Willis v. Brooks*, [1947] 1 A. E. R. 191.

§ 31.

Master and
servant.

§ 31. Persons having parental or quasi-parental authority.

Parents and other persons in similar positions are necessarily immune against liability for many acts which in other people would be assault, battery or false imprisonment. They have control, usually but not necessarily of a disciplinary character, over those committed to their charge. The nature of the control varies according to the relationship, and provided that it is exercised reasonably and moderately, acts done in pursuance of it are not tortious.

Parental authority needs no illustration; it ceases when the child attains twenty-one years. Quasi-parental authority is exemplified by the control of schoolmasters over pupils, universities and colleges over undergraduates, husband over wife, master over apprentice, and custodian over lunatic. Of course the control is qualified by the terms of any agreement or contract relating to it.

Parental
or quasi
parental
authority
School-
masters.

The control of a schoolmaster over his pupil is really delegated to him by the parent. The delegation seems to include implied assent of the parent to any reasonable rule or custom of the school relating to discipline, whether the parent knew of it or not (l); unless the child were sent to the school on the understanding that some rule or custom prevalent there (i) should not apply to him, or, perhaps, (ii) should not be materially altered without giving the parent an opportunity of refusing to permit the change to apply to his child (m). It is not limited to the school premises, for "there is not much opportunity for a boy to exhibit his moral conduct while in school under the eye of the master: the opportunity is while he is at play or outside the school" (n). Hence it is no assault if the master canes him for fighting in the street or for smoking in public (o). Supposing that the boy were to break a rule of the school which directly conflicts with his father's instructions to him, how can he escape a flogging? At present the law is doubtful. If both rules are foolish, perhaps his only consolation in the dilemma is the Horatian

(l) *R. v. Newport (Salop) Justices*, [1929] 2 K. B. 416; *Ryan v. Fildes*, [1938] 3 A. E. R. 517.

(m) *Mansell v. Griffin*, [1908] 1 K. B. at p 167, *sed. qu.*

(n) Collins, J., in *Cleary v. Booth*, [1893] 1 Q. B. 465, 469.

(o) *R. v. Newport (Salop) Justices*, [1929] 2 K. B. 416.

quotation, "Quidquid delirant reges, plectuntur Achivi" (p). If the school rule were reasonable, perhaps that would be a defence to the schoolmaster unless he had agreed with the parent that the boy should be exempted from it. Assistant teachers may inflict corporal punishment provided it is moderate, is such as is usual in the school and as the parent might expect that the child would receive if it did wrong, and is not dictated by any bad motive (q). Whether an assistant teacher, even if he satisfies these requirements, is still within his rights if the school regulations forbid him to inflict corporal punishment is doubtful (r).

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As to husband and wife, in the older law he had the right to beat her moderately as a method of correction (s). "But, with us," said Blackstone in 1768, "in the politer reign of Charles the Second, this power of correction began to be doubted: and a wife may now have security of the peace against her husband; or in return a husband against his wife. Yet the lower rank of people, who are always fond of the old common law, still claim and exert their antient privilege" (t). The right is now obsolete, nor can the husband even use force to recapture his wife if she has left him in breach of his conjugal rights, though he can probably prevent her from escaping in order to commit marital misconduct, e.g., if she is on the staircase about to join someone with whom she intends to elope (u). It will be recollected that actions in tort between husband and wife are not maintainable except for the protection of the wife's property (u), but the law stated above is important in criminal remedies for assault (b).

Husband
and wife.

(p) Lord Hewart, C.J., *ibid*, 429. The American Restatement of Torts, vol. 1, § 153, solves the problem by making the schoolmaster liable unless the school is one provided by the State, for then the schoolmaster is the delegate of the State and not of the parent.

(q) *Mansell v. Griffin*, [1908] 1 K. B. 160, 947.

(r) The Divisional Court in *Mansell's Case* (last note) seemed to think that the teacher still has such power; but the reasoning at p. 167 is not convincing, and the Court of Appeal, while otherwise affirming the decision, declined to express an opinion on this point: [1908] 1 K. B. 947.

(s) "For that is a poynt of an honest man,

For to bete his wife well nowe and than."

Johan Johan (one of Heywood's Comedies, *circa* 1533).

(t) 1 Commentaries, 444—445.

(u) *R. v. Jackson*, [1891] 1 Q. B. 671, 679—680, 683, 685.

(a) *Ante*, § 25.

(b) A husband, who had been bound over to be of good behaviour, was convicted of assaulting his wife by kissing her against her will: 72 Solicitors' Journal (1928), 309.

§§ 31-32.

Master
of ship.

Authority similar to quasi-parental authority may be implied by law. ~~Thus the master of a merchant ship can use force to preserve discipline for the safety of the ship, its crew, passengers and cargo.~~ If he has reasonable cause to believe that any one on board is about to raise a mutiny he may put him under arrest. If possible, an inquiry should precede punishment, and the accused "should have the benefit of that rule of universal justice of being heard in his own defence" (c). The punishment must of course not be excessive (d), and it must always be a question of fact whether the occasion justifies arrest (e).

It should be noted that where disciplinary measures are incidental to the species of control under consideration, they may have to be exercised in some cases with a "quasi-judicial" discretion; e.g., the authority of the Benchers of an Inn of Court to expel a student or to disbar a barrister. The proper exercise of this discretion is therefore one of the conditions of control in such cases, and if it be abused, a wrong which is possibly a tort is committed. But to this we must recur when we come to deal with "Abuse of quasi-judicial powers" (f).

§ 32. Master and servant.

The liability of a master for the torts of his servant is an example of vicarious liability in tort, i.e., where A is liable for the tort of B committed against C, though A is no party to the tort. B himself is of course usually liable. There are other instances of vicarious liability which do not appear to be important enough to be included under a chapter on "Capacity". Such are the principal who may be liable for the tort of his agent and the partner who may be liable for his partner's torts. Discussion of their position is to be found

(c) *The Agincourt* (1824), 1 Hagg. (Ecclesiastical, etc.), 271, 274.

(d) It was so in *The Agincourt* (last note) where a member of the crew was cruelly kicked and beaten.

(e) If a passenger describes the captain of a ship as the "landlord of a hotel", that does not justify the captain putting him in irons in the belief that mutiny is imminent: *King v. Franklin* (1858), 1 F. & F. 360.

For the provisions of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 220-238, as to discipline, see Temperley, *Merchant Shipping Acts* (4th ed., 1932), 141 *seq.*

(f) *Post*, § 152.

in monographs on the law of agency (g) and the law of partnership (h). § 32.

✓ It has already been pointed out that, although in a sense vicarious liability is a species of joint liability, yet joint liability differs from it in that there A is a party to the tort committed by B and that there is no need to resort to vicarious liability in order to hold both equally liable (i).

✓ The rule as to liability stated.—The master is liable for any tort which the servant commits in the course of his employment. (The servant himself is also liable (k).) The rule stated.

✓ Historical outline.—Historically, the idea of vicarious responsibility is common enough. A good deal of primitive law is founded on revenge, and revenge tends to be indiscriminate. In the Mosaic Code it is significant that it was found necessary to state expressly that each man should be put to death only for his own sin and not for that of his father or son, and Plato thought it advisable to assert a similar principle in his Laws (l). Historical sketch.

✓ In our own law (m) the early Anglo-Norman period is a transitional one in which the idea of complete liability for the wrongs of servants or slaves is changing to the idea of liability only where there has been command or consent on the part of the master to the servant's wrong. Between A.D. 1300 and 1700 the change continues until by the early sixteenth century the command theory has become established. Thenceforward, during that century and the seventeenth, the master's liability is considerably narrowed by the doctrine that he is not liable unless he particularly commanded the very act done (n). But this doctrine gave way between A.D. 1700 and 1800 to the rule that the master was

(g) Bowstead, Agency (10th ed. 1944), 205 *seq.*

(h) Lindley, Partnership (10th ed., 1935), Index, "Torts"; Pollock, Partnership (14th ed., 1944), 40 *seq.*

(i) *Ante*, pp. 107—108.

(k) *Perkins v. Smith* (1752), 1 Wils. 328; *Stephens v. Elwall* (1815), 4 M. & S. 259.

(l) Salmond, Jurisprudence (10th ed.) § 152.

(m) Most of this historical account is taken from Professor J. H. Wigmore's article in *Select Essays in Anglo-American Legal History* (1909), m, 520 *seq.* See, also, Holdsworth, *Hist. of Eng. Law*, iii, 382—387, viii, 472—482.

(n) "For trespass of battery, or wrongful entry into lands or tenements ne yet for felony or murther, the master shall not be charged for his servant unless he did it by his commandment." Doctor and Student (ed. 1531), Chap. 42.

§ 32.

liable if an implied command could be inferred from the general authority which he had given to the servant. This change was inevitable owing to the rising tide of commercial prosperity in England. Trade had become far too complicated to allow the "particular command" theory, which suited the old simple relation of master and servant well enough, to cover persons like factors or agents who were not accustomed to take their orders like a slave or a private soldier. Of course this does not explain why the master should be liable at all, and for the rule various reasons—all unconvincing—were given by the lawyers. Some said that it was more reasonable that the master should suffer for the wrongs of his servants than the strangers injured by them, because the master trusts the servants (o); others that no man shall be allowed to take advantage of his own wrong (p); while others took refuge in otiose fictions like, "The master undertakes for the servant's care", "The act of the servant is the act of the master", or in rhythmical inanities like "Qui facit per alium facit per se", "Respondeat superior".

✓ During the nineteenth century the "implied command" theory was displaced by the "scope of employment" theory which is now the rule (q).

A scientific reason for the rule is hard to find. It seems to be based on a mixture of ideas—that the master can usually pay while the servant cannot; that a master must conduct his business with due regard to the safety of others; that the master by employing the servant has "set the whole thing in motion". The rule would be an intolerable burden on the master but for the fact that he often covers his risk by insurance.

Who is
servant?

✓ Who is a servant?—For the purpose of vicarious liability,

(o) Holt, C.J., in *Hern v. Nichols* (c. 1709), 1 Salk. 289; Pratt, C.J. in *Armory v. Delamirie* (1722), 1 Stra. 505.

(p) Blackstone, 1 Comm. 432.

(q) Professor Wigmore regards Lord Kenyon as chiefly responsible for the change, but the cases which he cites in support of this are tenuous, and in one of them (*Laugher v. Pointer* (1826), 5 B. & C. 547, 577) an opinion of Abbott, C.J., is attributed to Lord Kenyon: Essays in A.A. Legal History, III, 533–534. I should trace the development of the "scope of employment" rule in the following cases: *McManus v. Crieke* (1800), 1 East 106; *Boucher v. Nodstrom* (1809), 1 Taunt. 568; *Croft v. Alison* (1821), 4 B. & Ald. 590; *Laugher v. Pointer* (*supra*, per Abbott, C.J.: note that his brethren speak in much looser terms); *Joel v. Morison* (1834), 6 C. & P. 502; *Slcath v. Wilson* (1839), *ibid.* 607; *Lamb v. Palk* (1840), 9 C. & P. 629. Chitty, *Practice of the Law* (2nd ed., 1834), i, 79–80, states the rule.

a servant is one whose work is under the control of another. He must be distinguished from an independent contractor, "who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified beforehand" (r). In general, an employer is not liable for the torts of his independent contractor. But he will be if he gives him authority to do some careless act. Thus, if you hire a taxi-cab to drive you to the station, the driver is not your servant but is an independent contractor, and if he negligently knocks over X, X has no remedy against you; but you will be liable if the accident occurred because you urged the driver to go at a dangerous speed because you were pressed for time to catch the train. Again, as we shall see later, there are certain torts of "strict liability" and in some of these the defendant may be liable even for the wrongs of his independent contractor (s).

✓ § 52.

Distinguish independent contractor.

✓ Difficult cases arise where A is the general employer of C, and B, by agreement with A (whether contractual or otherwise) is making temporary use of C's services. If C, in the course of his employment, commits a tort against X, is it A or B who is vicariously liable to X? A typical instance is where A lets or lends to B a vehicle or machine of which C is the driver or operator, and by C's negligent management of it X is injured. The answer to the question depends entirely on the facts of each case and among these facts must

(r) Pollock, Torts, 64. Adopted by McCaigie, J., in *Performing Right Society, Ltd. v. Mitchell, etc., Ltd.*, [1924] 1 K. B. 762, 767-768 (W. Cases, 39). Cf. *Eggington v. Reader* (1936), 52 T. L. R. 212.

(s) *Post*, Chap. XIX. Other exceptions are given in Beven, *Negligence in Law* (4th ed., 1928), 1, 527 *seq.* They are criticised as unscientific by Mr. S. Chapman in 50 *Law Quarterly Review* (1934), 71-81. They certainly appear to be incidents in other branches of the law of tort rather than exceptions to the rule about independent contractors. Thus one of them is "where the work he [the employer] imposes upon another is illegal." But surely the employer is liable here simply because he is a joint tortfeasor with the independent contractor. There is no need to go out of one's way in order to describe this as an "exception" to the general rule of non-liability. Mr. Chapman says (at pp. 75-76): "The whole test is whether I am under a duty which has not been performed, and it matters not whether that duty is one imposed by statute or by contract or by common law in tort. If that duty and the non-performance of it are once established, it is of no avail for me to say that I had asked someone else to perform it for me". Provided this includes acts as well as omissions, it is sound enough; of course it will not release the practitioner from going to the reports to find out whether a "duty" exists or not.

§ 32. be included the terms of the agreement between A and B (t).

The general test to be applied in assessing the facts was fully considered by the House of Lords in *Mersey Docks and Harbour Board v. Coggins & Griffiths, Ltd.* (u). It may be summarised thus. B is not liable to X unless B is entitled to tell C not only what he is to do but also the way in which he is to do it. If B is not thus entitled, A is liable to X and the burden of proving that this full control of C's acts has shifted to B lies upon A. A did not discharge the burden of proof in this case, the facts of which were that he had let a mobile crane to B, together with the services of C, a craneman, who injured X by negligent driving of the crane. A was therefore held liable to X. It is noteworthy that Viscount Simon said: "If, however, the hirers intervene to give directions how to drive which they have no authority to give, and the driver pro hac vice complies with them, with the result that a third party is negligently damaged, the hirers may be liable as joint tortfeasors" (a) (sc., with the driver, not with A, his general employer, for A is not liable at all in such circumstances).

On this topic, two further cases may be selected from the numerous decisions (b) as examples. In *Quarman v. Burnett* (c), the defendants, who owned a carriage, habitually hired from X horses to draw it and X also supplied Y as driver. Owing to Y's negligence while he was driving the defendants, the plaintiff's chaise was damaged. The defendants were held not liable, although they always paid Y a fixed sum for each drive and provided him with a livery for

(t) But it is only one of the facts; thus, a term in the agreement that C shall be the servant of B is not sufficient by itself to establish that liability for C's tort shall fall upon B and not upon A, although it may entitle A to claim indemnity from B for the damages that A has had to pay X; *Mersey Docks and Harbour Board v. Coggins & Griffiths, Ltd.*, [1917] A. C. 1, 10. As to requisition by the Government of A's vehicle, to be driven by A's servant, see *Marney v. Campbell, Symonds & Co., Ltd.* (1916), 62 T. L. R. 324. See, too, *Bontex Knitting Works, Ltd. v. St. John's Garage*, [1913] 2 A. E. R. 690.

(u) [1947] A. C. 1. Applied in *Chawdhary v. Gullat*, [1947] 2 A. E. R. 541.

(a) [1917] A. C., at p. 12.

(b) Some of them are difficult to reconcile. Thus *Willard v. Whiteley, Ltd.*, [1938] 3 A. E. R. 779, seems to conflict with *Leggatt & San v. Normanton* (1929), 98 L. J. K. B. 145; *Danavan v. Laing Construction Syndicate*, [1893] 1 Q. B. 629; *Société Maritime Française v. Shanghai, etc., Dock Co.* (1921), 90 L. J. P. C. 85; and *Bull & Co. v. West African, etc., Co.*, [1927] A. C. 686. So, too, *Danavan's Case* (ante) has been frequently "distinguished" in later cases; e.g., *Clelland v. Edward Lloyd, Ltd.*, [1938] 1 K. B. 272.

(c) (1840) 6 M. & W. 499.

each drive. In *Jones v. Scullard* (d), the facts were similar, except that X, although he supplied Y as a driver, did not supply the horses, which belonged to the defendant himself, who was held liable. This difference, coupled with the fact that the horse which ran away had only recently been bought by the defendant, so that Y was imperfectly acquainted with it, were regarded as sufficient to distinguish the case from *Quarman v. Burnett*.

§ 32.

By statute, owners of hackney carriages (which of course include cabs) are made responsible for the torts of the driver while he is plying for hire, as if the relationship of master and servant existed between them even though it does not in fact exist (e), but the tort must be committed in the course of the driver's employment (using the word "employment" in this fictitious sense) (f).

The relation of the governing body of a hospital to the various experts who work for it has been before the Courts on several occasions and some points in it are unsettled (g).

Liability for casual delegation.—It is convenient to treat here a doctrine which, although it originated in the rule as to a master's responsibility for the torts of his servant, has spread far beyond that relationship. It may be formulated thus. Where A, while still retaining his right of control of

Casual
delegation.

(d) [1898] 2 Q. B. 565.

(e) *Keen v. Henry*, [1894] 1 Q. B. 292; *Bygraves v. Dicker*, [1923] 2 K.B. 585. London Hackney Carriages Act, 1843 (6 & 7 Vict. c. 86), and (outside London) Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89).

(f) *Venables v. Smith* (1877), 2 Q. B. D. 279. For the position of a carrier by sea with respect to the torts of a stevedore employed by him, see Carriage of Goods by Sea Act, 1924 (14 & 15 Geo. 5, c. 22), as interpreted in *Brown & Co. v. Harrison* (1927), 96 L. J. K. B. 1025.

(g) Visiting physicians and surgeons are not the servants of a hospital: *Evans v. Liverpool Corporation*, [1906] 1 K. B. 160; nor is it material that they are paid for their work by the hospital authorities, for even then the authorities have no power to direct them how to do their work; *Collins v. Herts C.C.*, [1947] 1 K. B. 598. As to house physicians and surgeons, the question of liability of the hospital authorities for their negligence was left open in *Gold v. Esser C.C.*, [1912] 2 K. B. 293, 302, 310; but in *Collins v. Herts C.C.* (*supra*), Hilbery, J., held that the *dicta* in *Gold's Case* justified him in holding that, as the authorities had, on the facts of the case, control over the work of a lady, who was employed by them as a house surgeon, they were liable for her negligent treatment of a patient. As to hospital nurses, they are not servants of the hospital with respect to professional, as distinct from administrative, duties: *Strangways-Lesmire v. Clayton*, [1936] 2 K. B. 11; *Dryden v. Surrey C.C.*, [1936] 2 A. E. R. 535; but the C.A. in *Gold's Case* (*supra*), where a radio-grapher was held to be a servant, thought that a nurse ought to be reckoned as such; see Professor Goodhart in 54 L. Q. R., 553-575. As to the hospital governors' duty with respect to its premises, see *Lindsey C.C. v. Marshall*, [1937] A. C. 97.

§ 32

his chattel, allows B to use it, and B negligently injures C with it, A is liable to C.

The germ of the doctrine appeared a century ago in *Booth v. Mister* (h) where it was ruled that a master is still liable for harm inflicted by his cart on a plaintiff while it is in the charge of his servant even though the harm was due, not to the personal negligence of the servant, but to that of a third person whom the servant allowed to drive. The advent of the motor vehicle led to a rapid development of the principle within the last generation. In *Samson v. Aitchison* (i), the owner and driver of a car allowed the son of a possible purchaser to take over the driving, but he continued to sit by the son's side. The plaintiff was injured by the son's negligent driving and was held entitled to recover against the owner of the car.

Later decisions have gone on working out the principle in detail. Thus it is possible for A to retain the right of control of the chattel even if he is not present at the time of the accident, e.g., where he allows a friend to drive it (k). Nor is it in the least material to A's liability for casual delegation whether B is styled the "servant" or "agent" of A, for the essence of A's liability is the retention of the right of control. But of course if B is in fact his servant or agent, and the tort is committed by B in the course of his employment or agency, then A is liable on the principle of vicarious responsibility for the torts of his servants or agents, even though he might not have been liable within the doctrine of casual delegation. If an errand boy borrows his employer's bicycle and injures someone in the course of his employment, the employer is liable; if the injury is not committed in the course of employment, the employer is not liable as such (l); but he may well be liable as for casual delegation if such in fact be proved. If, therefore, A has abandoned his right of

(h) (1835), 7 C. & P. 66. This case was not followed in *Harris v. Fiat Motors, Ltd.* (1906), 22 T. L. R. 556; but it is submitted that it was not in point there, for *Harris' Case* was concerned with the very different question, "What emergency will justify a servant in delegating his duty to another, so as to make his act still within the course of his employment?" It is doubtful whether any emergency will suffice for this. *Gwilliam v. Twist*, [1895] 2 Q. B. 84.

(i) [1912] A. C. 844.

(k) *Parker v. Miller* (1926), 42 T. L. R. 408; see du Parcq, L. J., in *Hewitt v. Bonvin*, [1940] 1 K. B. 188, 195-196.

(l) *Higbid v. Hammett, Ltd.* (1932), 49 T. L. R. 104. Cf. *Thompson v. Reynolds*, [1926] N. I. 131.

control by contract with B, or by bailment of the chattel to him, A is not liable (m). Whether there is a casual delegation or an abandonment of the right of control is a question of fact in each case. I am not in control of my car if I lend it to my servant to take his friends to the theatre after his day's work is over (n).

§ 32.

The doctrine probably applies where A is in control of an enterprise as well as where he retains control of a chattel, e.g., where he accepts the help of B, a stranger, in searching for the source of a gas leak in his (A's) home, and owing to B's negligence an explosion occurs and injures C (o).

✓ What is the course of employment.—Unless the wrong done falls within the course of the servant's employment, the master is not liable. It may be asked, "How can any wrong be in the course of a servant's employment? No sane or law-abiding master ever hires a man to tell lies, give blows, or act carelessly". But that is not what course of employment means. Provided the wrong is committed as an incident to something that the servant is employed to do, that suffices to fix the master with liability. It is often an extremely difficult question to decide whether conduct is or is not within the course of employment as thus defined. It would seem that the question is one for a jury acting upon the direction of the Judge as to general principles (p).

Course of employment

✓ The decided cases are not very amenable to any scientific classification, and the best that can be done is to select and illustrate a few of the more conspicuous sub-rules.

✓ By far the commonest kind of wrong which the servant commits is one due to unlawful carelessness, whether it be negligence of the kind which is in itself a tort, or negligence which is a possible ingredient in some other tort. It should be noted here that in some torts (e.g., trespass) intention or

Carelessness of servant.

(m) *Samson v. Aitchison*, [1912] A. C. at p. 849; *Pratt v. Patrick*, [1924] 1 K. B. 488.

(n) *Britt v. Galmoye* (1928), 44 T. L. R. 291; *Hewitt v. Bonvin*, [1940] 1 K. B. 188. Even if there is no retention of the right of control, the owner may yet be liable on the principle of *Monk v. Warbey*, [1935] 1 K. B. 75 (W. Cases, 69); *post*, p. 158. Contrast *Daniels v. Vaux*, [1938] 2 K. B. 203.

(o) It was one of the grounds on which *Brooke v. Bool*, [1928] 2 K. B. 578, 584, was decided.

(p) One can only infer this from various cases: e.g., *Whalman v. Pearson* (1868), L. R. 3 C. P. 422; *Mitchell v. Crassweller* (1853), 13 C. B. 237; *Lloyd v. Grace, Smith & Co.*, [1912] A. C. 716; *Baker v. Snell*, [1906] 2 K. B. 825, 828.

§ 32. negligence is immaterial; the doer is liable either way. In cases of this sort the master may well be responsible for conduct of the servant to which no moral blame attaches (q). But, assuming that the tort is negligence or that it is one in which inadvertence is a possible element in its commission, it may still be in the course of employment even if the servant has deviated from his duty provided he is not "on a frolic of his own". He is within the course of his employment if he leaves his horse and cart in order to go a quarter of a mile to get his dinner, although his employer has forbidden him to leave the vehicle unattended during the hour permitted for that purpose (r); but if he goes off his normal route in order to perform some errand for a friend, he is acting outside the course of his employment (s). Getting one's dinner may be (and was in the former case) within the course of the servant's employment, and his absence for that purpose, although forbidden, was incidental to it; but a deviation which is not merely a roundabout way of going home but an entirely new journey was held in the latter case not to be incidental to the driver's employment.

In *Jefferson v. Derbyshire Farmers, Ltd.* (t), the plaintiff allowed the defendants to have the use of his garage for their motor lorries. A youth employed by the defendants in the garage, while drawing motor spirit from a drum into a tin, struck a match, lit a cigarette, and then threw the match on the floor. This set fire to a pool of petrol on the floor and the garage was burned down in consequence. The defendants were held liable, because the youth's negligence occurred in the course of his employment, but it is hard to follow the reasoning of the Court of Appeal on this point. They emphasised the fact that drawing inflammable spirit from the drum was a dangerous operation requiring special precautions. Nobody would deny this, but what connexion there is between this and lighting a cigarette being in the course of the youth's employment it is difficult to see. One would have thought that the more inflammable an operation is, the less connexion with its execution has the lighting of a cigarette. As we have said, the test of "course of employment" seems to be, "Was the

(q) *Gregory v. Piper* (1829), 9 B. & C. 591.

(r) *Whatman v. Pearson* (1868), L. R. 3 C. P. 422.

(s) *Storey v. Ashton* (1869), L. R. 4 Q. B. 476.

(t) [1921] 2 K. B. 281.

tort which the servant committed incidental to something that he was employed to do? ” No doubt smoking is now such a general habit that in many circumstances it might rightly be regarded as incidental to a person’s employment, but scarcely so on the facts of *Jefferson’s Case*.

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✓ However, in *Century Insurance Co. v. Northern Ireland Transport Board* (u), the House of Lords held, on facts very similar to those in *Jefferson’s Case*, that the servant was acting in the course of his employment. They briefly approved *Jefferson’s Case* (a).

So far we have been dealing with the incompetent *dilet-* ✓ Mistake of
tante and we now pass to the misguided enthusiast. *Bayley* servant.
v. Manchester, Sheffield and Lincolnshire Ry. (b) is an illustration. The defendants’ porter violently pulled out of a train the plaintiff who said his destination was Macclesfield and who was in a train that was going there. The porter mistakenly thought it was going elsewhere. The defendants were held liable. The porter was doing in a blundering way something which he was authorised to do,—to see that passengers were in the right trains and to do all in his power to promote their comfort.

✓ Another application of the same principle is an act done in protection of the master’s property. The servant has an implied authority to make reasonable efforts to protect and preserve it in an emergency which endangers it. For wrongful, because mistaken, acts done within the scope of that authority the master is liable and it is a question of degree whether there has been an excess of the authority so great as to put the act outside the scope of authority. A carter, who suspected on mistaken but reasonable grounds that a boy was pilfering sugar from the waggon of the carter’s employer, struck the boy on the back of the neck with his hand. The boy fell and a wheel of the waggon went over his foot. The employer was held liable because the blow given by the carter, although somewhat excessive, was not

(u) [1942] A. C. 509.

(a) They preferred the decision in that case to the decision of the majority of the Court of Exchequer Chamber in *Williams v. Jones* (1865), 3 H. & C. 602 (carpenter, employed by X to make a signboard, lit his pipe with a shaving, negligently dropped the lighted shaving on some more shavings and thus caused a fire which burned Y’s shed; held, the fire was not caused in the course of the carpenter’s employment and therefore X was not liable to Y).

(b) (1873), L. R. 8 C. P. 148 (W. Cases, 43).

§ 32. sufficiently so to make it outside the scope of employment:
Poland v. Parr & Sons (c).

In cases of this type the act done must be one of a class of acts which the servant is authorised to do; otherwise it will be outside the scope of employment whether or not there has been excess in the mode of doing it.

Wilful wrong
of servant.

Next, as to the servant's wilful wrongdoing. Here two rules are well settled.

In the first place the act done may still be in the course of employment even if it was expressly forbidden by the master.

In Limpus v. London General Omnibus Co. (d), a driver of the defendants' omnibus had printed instructions not to race with, or obstruct, other omnibuses. In disobedience to this order he obstructed the plaintiff's omnibus and caused a collision which injured it. The defendants were held liable because, according to the finding of the jury, the driver intended to benefit them (presumably by trying to get more passengers). This reason is insufficient since Lloyd's Case (infra) and the current view is that, if the servant's act is within the sphere of his employment, prohibition of it by the master will not exclude his liability; but that prohibition may possibly show that the act is entirely outside the sphere of employment, in which case the master is not liable (e). Whether the act is one or the other depends on the facts of each case.

In the second place, it does not follow that the servant is acting outside the scope of his employment because he intended to benefit himself and not his employer. It was generally thought that Willes, J., in Barrick v. English Joint Stock Bank (f) had laid down the rule that the wrong must be intended to benefit the master; but in Lloyd v. Grace, Smith & Co. (g), the House of Lords surprised the profession by holding not only that this was not the law, but also that

(c) [1927] 1 K. B. 236. Examples on the other side of the line are Abrahams v. Deakin, [1891] 1 Q. B. 516; Hanson v. Waller, [1901] 1 Q. B. 390.

(d) (1862), 1 H. & C. 526.

(e) Joseph Rand, Ltd. v. Craig, [1919] 1 Ch. 1; Canadian Pacific Ry. v. Lockhart, [1942] A. C. 591, 599; followed in McKean v. Raynor Bros., Ltd., [1942] 2 A. E. R. 650; Twine v. Bean's Express, Ltd., [1946] 1 A. E. R. 202.

(f) (1867), L. R. 2 Ex. 259, 265.

(g) [1912] A. C. 716 (W. Cases, 45). See, too, Uxbridge Permanent, etc., Society v. Pickard, [1939] 2 K. B. 248; British Ry., etc., Co., Ltd. v. Koper (1940), 162 L. T. 217.

Barwick's Case had never been any authority for supposing that it was (h). In *Lloyd's Case*, the defendants, a firm of solicitors, employed a managing clerk who conducted their conveyancing business without supervision. The plaintiff, who was a widow, owned some cottages. She was dissatisfied with the money which they produced and went to the defendants' office where she saw the clerk, who induced her to give him instructions to sell the cottages and to execute two documents which he falsely told her were necessary for the sale but which in fact were a conveyance of the cottages to himself. He then dishonestly disposed of the property for his own benefit. The Court of Appeal by a majority held that the defendants were not liable for the clerk's fraud (i); the House of Lords unanimously held that they were liable. It would appear from Lord Macnaghten's speech that *Lloyd's Case* probably does not go farther than this: in *mercantile transactions*, A, the principal or employer, is liable for the fraud of B, his agent or employee, for loss suffered by C, even if B were acting solely for B's purposes, provided that C reasonably regarded B as having been appointed by A for performing the class of acts, dishonest performance of which caused C's loss. Lord Macnaghten's reason was that otherwise principals would be enabled largely to avail themselves of the frauds of agents without themselves being liable. With great respect, this is unconvincing, for in *Lloyd's Case* the principal stood to gain nothing whatever, quite apart from his liability to the plaintiff. Would it not be better to say that the course of business in mercantile transactions would be greatly obstructed if C always had to assure himself of the honesty of A's representatives before he dealt with them? (k). Nor is A's liability unqualified, for later decisions show that where the master has neither been negligent in the selection or supervision of his servant nor has expressly or impliedly held out his servant as having authority to do the act, he will not be responsible for the servant's crime (l). ✓

(h) But those who made this error were at any rate in the respectable company of Lord Bowen and Lord Davey, whose *dicta* in earlier cases were overruled in *Lloyd's Case*.

(i) [1911] 2 K. B. 489.

(k) Lord Macnaghten, [1912] A. C. at p. 731, accepted a distinction set up earlier by Lord Selborne between agency and vicarious liability in tort, which seems to be supported neither by the cases on which Lord Selborne relied, nor by history: cf. Holdsworth, *H. E. L.*, viii, 227.

(l) *Mintz v. Silvertown* (1920), 36 T. L. R. 399; *Cheshire v. Bailey*,

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In the law of bailment, vicarious responsibility for the tort of a servant has been employed in a rather curious fashion. It has been made a test of whether the bailee has exercised reasonable care where the bailed goods have been injured by the bailee's servant. Suppose that A bails his car to B and that B's servant negligently injures the car. Is B liable to A for breach of his duty as a bailee? The touchstone for determining the liability of a bailee is, "Did he take reasonable care of the thing bailed?" In solving this question, the Courts have found it useful in cases like the one under discussion to narrow the test still farther by holding that if the servant were acting in the course of his employment, then B has not taken reasonable care and is liable; but that he is not liable if the servant were acting outside the scope of his employment (*m*). This importation of an idea commonly associated with the law of tort is defensible on practical grounds, although there are possibilities of confusion in it (*n*).

The Carriage of Goods by Sea Act, 1924 (*o*), makes a carrier by sea liable for the fault or neglect of his agents or servants, whether it occurs in the course of employment or not (*p*).

Common
employment.

Common employment.—A remarkable modification of the master's liability is the doctrine of common employment. It is that, at Common Law, a master is not liable to his servant for any injury received from any ordinary risk of service,

[1905] 1 K. B. 237; (for another view of this case, see Salmond, *Torts*, pp. 96–97); *Joseph Rand, Ltd. v. Craig*, [1919] 1 Ch. 1; *Lawlor v. O'Connor*, [1929] W. C. & Ins. Rep. 185; *Slingsby v. District Bank, Ltd.*, [1932] 1 K. B. 544; *Kleinwort, Sons & Co. v. Associated Automatic Machine Corporation, Ltd.* (1931), 50 T. L. R. 244.

In the American case, *Croaker v. Chicago, etc., Ry.* (1875), 17 Am. Rep. 504, defendants were held liable for an assault by one of their train-conductors in kissing a female passenger against her will, but the basis of the decision was (1) breach of defendants' contract of safe carriage rather than (2) vicarious responsibility in tort. But whether it were (1) or (2), it seems to go beyond any English authority. For as to (1), *Readhead v. M. Ry.* (1869), L. R. 4 Q. B. 379, requires of a railway company no more than due care in the carriage of its passengers, and it ought to be no more liable for a hidden defect in its servants than for a hidden defect in its carriage tyres; and as to (2), it is impossible to see that kissing a passenger is in any way incidental to what the conductor was employed to do.

(*m*) *Atchison v. Page Motors, Ltd.* (1935), 151 L. T. 128; *Sanderson v. Collins*, [1904] 1 K. B. 628.

(*n*) Cf. Salmond, *Torts*, pp. 98–99.

(*o*) 14 & 15 Geo. 5, c. 22, Sched. Art. IV. s. 2 (*q*).

(*p*) *Brown & Co. v. Harrison* (1927), 96 L. J. K. B. 1025.

including acts or defaults of fellow-servants (q). It is important to note that the rule is not limited to injuries from fellow-servants. It extends also to risks of service not due to them at all, and indeed in the very case which created the doctrine, the injury perhaps arose from a defect in the master's vehicle rather than from negligence of a fellow-servant. It is scarcely necessary to say that where it is a fellow-servant who has caused the harm, he is liable even if his master is not liable.

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Origin of doctrine.—The rule came into existence in *Priestley v. Fowler* (1837) (r), where the plaintiff, a butcher-boy, was injured by the collapse of his master's van in which he was travelling; the accident was due to negligence (s) in overloading the van. It was held that the master was not liable. Lord Abinger, C.B., delivered the judgment of the Court. Some of the reasoning in it was bad, but its chief ground was that if the action were allowed it would increase the responsibilities of masters to an alarming extent. "But, in truth the mere relation of the master and the servant never can imply an obligation on the part of the master to take more care of the servant than he may reasonably be expected to do of himself. He is, no doubt, bound to provide for the safety of his servant in the course of his employment, to the best of his judgment, information and belief" (t). This quotation appears to represent a sound principle. Whether it was misapplied to the facts of the case itself cannot well be decided, for the facts themselves are not fully reported. And even the decision itself is intelligible enough when it is recollected that the liability of the master for torts committed by servants was very burdensome, and that its restriction to torts committed in the course of employment had not been long established (u) and was as yet imperfectly worked out. Hence the refusal of the Court to extend the liability any farther was in relief of a person who already had enough to bear (a). Unfortunately, later decisions went far beyond *Priestley v.*

Its origin.

(q) *Hutchinson v. York, Newcastle & Berwick Ry.* (1858), 5 Ex. at p. 352; *Bartonshill Coal Co. v. Reid* (1858), 3 Macq. at p. 277; *Tozeland v. West Ham Union*, [1906] 1 K. B. at p. 543.

(r) 3 M. & W. 1 (W. Cases, 49).

(s) Whose negligence does not appear, but at any rate the master knew that the van was overloaded: see the report in *Murphy & Hurlstone*, 305.

(t) 3 M. & W. at p. 6.

(u) *Ante*, p. 117. Lord Abinger ignores the existence of the restriction.

(a) *Hayward v. Drury Lane Theatre, Ltd.*, [1917] 2 K. B. 899, 915.

§ 32. *Fowler*. "Lord Abinger planted the doctrine of common employment, Baron Alderson watered it and the Devil gave it increase." It ripened into the sweeping rule stated at the beginning of this paragraph, and the following reasoning laid down in an American case in 1842 (b) has been regarded in our own Courts as a justification of it (c). The master's relation to his servant depends upon contract and upon nothing else. The contract is not likely to contain any clause which expressly indemnifies the servant against harm due to his employment, and it is too much to imply any such clause; on the contrary, the servant impliedly contracts to take upon himself the natural risks incident to his employment. Nor, it was said, is the fact that the master is liable to strangers for the torts of his servants really in point. He is liable to them in tort and in nothing else; whereas he is liable (if at all) to his servant in contract and in nothing else.

^ This reasoning went perilously near to a fallacy that we shall encounter elsewhere in the nineteenth century law of tort,—that *because A is not under a particular liability to B in contract, therefore that particular liability cannot arise in tort* (d). "Implied contract" is still accepted as the theoretical foundation of the doctrine, but no Court is now under any delusion as to its extreme artificiality (e). But a much more serious criticism is that the doctrine of common employment on its practical side was quite unsuitable to the enormous development of industrial machines that was then

(b) *Farwell v. Boston, etc., Railroad Corporation* (1842), 4 Met. 49. A more accessible report for English readers is 149 R. R. 262.

(c) *Johnson v. Lindsay & Co.*, [1891] A. C. 371, 376—377; *The Petrel*, [1893] P. 320, 323—325.

(d) Cf. Lord Wright in *Radcliffe v. Ribble Motor Services, Ltd.*, [1939] A. C. 215, 241.

(e) *Radcliffe's Case* (last note), at pp 228, 234—235, 247. The artificiality is demonstrated by the uncertainty of the law as to the extent to which compulsory service (independent of any contract) on the part of the servant will negative the application of common employment. According to *Tozeand v. West Ham Union*, [1906] 1 K. B. 538, and *Smith v. Steele* (1875), L. R. 10 Q. B. 125, compulsion makes common employment no defence. In *Alexander v. Trudegar Iron and Steel Co., Ltd.*, [1945] A. C. 286, the House of Lords held that, where there is a contract of employment already in existence, compulsion to remain in that employment, under a regulation of the Essential Work Order, will not affect the application of common employment; but they left open the question whether this would be so where the service is imposed by the Order on a person who is under no contract to render it; and in *Read v. Lyons & Co., Ltd.*, [1945] 1 K. B. 216, the Court of Appeal found it unnecessary to express an opinion on the question, and no mention of it was made in the appeal to the House of Lords, [1947] A. C. 156.

beginning. It was idle to say that a railway employee had the faintest conception of most of the risks which he ran from the railway itself or from his fellow-servants. A barmaid in the refreshment-room might not know of the existence of a plate-layer on the line, or what risks she ran from his incompetence (f). However, the doctrine being what it is, we have to explore its scope.

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✓ And first, what servants can be regarded as in common employment? This question, as well as the basis of common employment, were closely examined by the House of Lords in Radcliffe v. Ribble Motor Services, Ltd. (g). They rejected a test which had found some favour,—that if the employees are working “with a common object”, they are in common employment; for that might mean no more than “the common object of assisting the employer to make a profit out of his business” (h). The criterion which they did adopt was that two employees, A and B, are in common employment if the skill and care of A are of such special importance to B, by reason of the relation between their services, that the risk of injury to B is the natural and necessary consequence of A’s misconduct in failing to show such skill and care. In Radcliffe’s Case, A and B were motor drivers employed by the defendants to take parties by motor coaches from Liverpool to New Brighton. B had been told to return to the defendant’s garage at Bootle, the particular route on his return being left to his own discretion. On the return journey he stopped at a particular point for some unknown reason. A happened to be returning by the same route and, in pulling out to pass B’s vehicle, he negligently knocked over and killed B, who was standing by his own vehicle. Held: the defendants were liable to B’s personal representative. A and B were not in common employment, for the work upon which they were engaged involved their dispersal, not their collaboration (i). Contrast with this the working of a railway.

What employment is common?

(f) For further criticisms, see Holdsworth, *Hist. of English Law*, viii, 480—482; Professor Francis H. Bohlen, in *Selected Essays on the Law of Tort* (1924), 514, n. 1; Pollock, *Torts*, 79—81; Pound, *Interpretations of Legal History* (1923), 109 *seq.*

(g) [1939] A. C. 215 (W. Cases, 51). See, too, Viscount Simon in *Graham (or Miller) v. Glasgow Corporation*, [1947] A. C. 368, 372—375.

(h) Lord Atkin, [1939] A. C. at p. 229.

(i) See, too, *Pollock v. Charles Burt, Ltd.*, [1941] 1 K. B. 121; *Colmon v. Isaac Croft & Sons*, [1947] 1 K. B. 95 (*post*, p. 136); *Barrington v. Kent Rivers Catchment Board*, [1947] 2 A. E. R. 782.

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Normally, workers on the line and the adjoining premises—porters, engine-drivers, booking-clerks, signalmen—are all in common employment (k). But both here and in other occupations each case must be taken on its own facts. Ordinarily, a porter and a signaller at the same railway station would be in common employment. Ordinarily, my housemaid at my country-house and my lift-boy in my town office would not be in common employment. But it no more follows that the porter and the signaller are always in common employment than that the housemaid and the lift-boy can never be in this relation. There may be variations in “the relations between their services” which may put them in one or the other category at different times.

It must be noted that in *Graham* (or *Miller*) v. *Glasgow Corporation* (l) the House of Lords pointed out that their decision in *Radcliffe's Case* (supra) must not be construed as having held that the defence of common employment can never apply when two vehicles driven by fellow-servants of the same employer collide on the highway. It is applicable if the risk of collision between them is merely the ordinary risk arising from contiguity of traffic, i.e., the risk of being run into by another vehicle, whoever is its driver; for then the injured party has no special interest in the skill and caution of his fellow-servant, as distinct from the general interest that all of us have in the safety of the highway. Hence, in this case, the facts were such that the defendants were held not liable to the conductress of one of their tramcars for an injury inflicted on her by the negligence of the driver of another of their tramcars. The dependence of each case on its facts has made fine distinctions inevitable. Thus, in the above case, the collision between the tramcars occurred when they were on the same set of rails, and it was therefore impossible for either car to avoid the other by lateral deviation, so that the conductress who was injured had a special interest in the skill and caution of the driver of the other car; therefore she was in common employment with him. On the other hand, in *Glasgow Corporation v. Bruce* (m), the House of Lords held that the

(k) See Lord Wright in *Radcliffe's Case*, [1939] A. C. at pp. 242–243, 249; and, for other examples, C. M. Smith, *Master and Servant* (8th ed.), 154–178, and *Metcalfe v. London Passenger Transport Board* (1939), 108 L. J. K. B. 733; *McGovern v. L. M. & S. Ry.*, [1944] 1 A. E. R. 730.

(l) [1917] A. C. 368. See, too, *Lancaster v. L.P.T.B.*, [1947] 2 A. E. R. 267.

(m) [1948] A. C. 79.

employment was not common where the collision was between two omnibuses of the employers, which were on different services, although a substantial portion of the routes taken in those services was common to both vehicles.

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✓ Common employment has no application where a servant sustains an injury owing to the negligence of a fellow-servant at a moment when the injured party is off duty; the employer is liable in such a case (n).

The position of a volunteer.—One who, not being himself a servant, voluntarily assists a servant in his work and is injured by the latter's negligence is in no better position than if he were a fellow-servant. He cannot recover damages from the master. Such, too, is the position of one who is a servant for a particular job, if he voluntarily assists in a different job (o).

Volunteer
may be
reckoned
as a
servant

✓ Thus in Degg v. Midland Ry. (p), Degg, a servant of Messrs. Pickford, the carriers, was engaged in unloading a truck on the defendants' railway. He saw some of the defendants' servants in difficulties with moving a turntable. He called upon them to stop and said he would help them. He was crushed to death by the negligence of one of them while he was assisting them with the turntable. In an action under the Fatal Accidents Act, 1846, on behalf of his widow it was held that the defendants were not liable for two reasons. First, the deceased could not by volunteering his services have any greater rights or impose any greater duty on the defendants than if he had been a hired servant; secondly, he was a trespasser in interfering with the turntable.

The decision has been repeatedly followed (q), although the reasoning in it has been criticised (r). On the facts the decision seems to be a sound one for the second reason; Degg was a trespasser as to the turntable, however good his motive may have been; and, although in certain circumstances even a trespasser can recover damages for injuries, in general he must take conditions as he finds them. It is suggested that

(n) *Dorrington v. L.P.T.B.*, [1947] 2 A. E. R. 84.

(o) *Bloor v. Liverpool, etc., Co., Ltd.*, [1936] 3 A. E. R. 399; *Lancaster v. L.P.T.B.*, [1947] 2 A. E. R. 267.

(p) (1857), 1 H. & N. 773

(q) *Potter v. Faulkner* (1861), 1 B. & S. 800; *Bass v. Hendon U. D. C.*, (1912), 28 T. L. R. 317; *Heasmer v. Pickfords, Ltd.* (1920), 36 T. L. R. 818; *Bromiley v. Collins*, [1936] 2 A. E. R. 1061.

(r) *Scrutton, L.J.*, in *Hayward v. Drury Lane Theatre, Ltd.*, [1917] 2 K. B. 899, 910-911; Lord Wright in *Radcliffe v. Ribble Motor Services, Ltd.*, [1939] A. C. 215, 247.

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most of the decisions might have been based on the following principles. Where the volunteer was invited by the servants to assist, he cannot sue the master for his injuries because the master is liable only for wrongs of his servants committed in the course of their employment, and, usually, inviting a stranger to help in the work is not sufficiently connected with their service to make any consequential injury done by them a tort committed in the course of employment; where, on the other hand, there is no invitation, the volunteer is merely a trespasser (s) to the land upon which he comes or to the chattels with which he interferes. It may be said that this explanation will not cover the case of an invitation given, not by the servants, but by the master himself; but as we shall see almost immediately, that seems to be a case which has nothing to do with common employment.

✓ Where the volunteer is a child, who is too young to realise the risks of the operation in which he has volunteered to assist, the doctrine has no application. If he is injured by the negligence of a servant, in the course of the operation, he can recover damages from the servant's employer (the servant, of course, is liable, but is usually not worth suing); for the doctrine of common employment is based on the fiction of implied assent of the servant to the risks of the employment, and the fiction will not be stretched to include a case in which the capacity of a volunteer to appreciate such risks is obviously lacking (t). ✓

Except where
he has a
common
interest, ✓

✓ An exception to the rule as to volunteers occurs where the volunteer renders services in which he has a common interest with the employer of the servant who does him the injury. This qualification did not originate as an exception to the common employment rule but was based on the broad principle that an occupier of property must keep it in a reasonably fit condition for a person who comes on it for purposes in which both have an interest. Such was the view taken in *Holmes v. N. E. Ry. (u)*. The plaintiff assisted the

(s) *Quære* whether the defence applies against one who is volunteering to preserve the property of another in an emergency? *Cutler v. United Dairies (London), Ltd.*, [1933] 2 K. B. 297, 305, 306—307.

(t) *Holdman v. Hamlyn*, [1943] K. B. 664; see, especially, the judgment of du Parcq, L.J. It seems that in *Bass's Case*, *Heasmer's Case* and *Bromiley's Case* (ante, p. 133, note (q)), the child was old enough to appreciate the risk, and was therefore unable to recover.

(u) (1869), L. R. 4 Ex. 254; affirmed in L. R. 6 Ex. 123 for the reasons given in the Court below.

defendants' servants to unload the plaintiff's coal from a railway wagon. He did so with the permission of the station-master and was injured by falling through a defective flag. The defendants were held liable. Nothing was said of common employment, but it was argued for the defendants that the plaintiff was not really helping them to carry out their contract to deliver the coal to him, but was availing himself for his own purposes of a mere permission to interfere. It was held, however, that he was not a "mere licensee" on the premises but that in effect he had been invited there on business of common interest to himself and the defendants, —the delivery and receipt of the coal. Therefore he was entitled to find the premises in a reasonably fit condition.

A few years later, in *Wright v. L. & N. W. Ry.* (a), where the plaintiff was injured by the negligence of the defendants' servants while he was helping them, with the assent of the station-master, to shunt a horsebox containing a heifer of his, the defence of common employment was pleaded, but was adjudged bad on the ground of common interest. In the later case of *Hayward v. Drury Lane Theatre, Ltd.* (b), Scrutton, L.J., placed the ability of the plaintiff to recover on the same ground as that in *Holmes' Case*, i.e., duty on the defendants' part to keep their premises reasonably safe for persons in the plaintiff's position. In a still later case, however, the Court of Appeal merely adopted the ground of common interest (c).

In *Hayward's Case*, H, the plaintiff, was a dancer. The defendants were using a theatre for the production of a revue. On their invitation H attended rehearsals of the revue. She was under no contract to do so nor was she paid anything, but she attended in the hope and expectation of being employed in the revue when it was ready for production. While she was on the stage she was injured by the collapse of a staircase on which she had been directed to stand. The collapse was due to the negligence of the defendants' servant. The defendants were held liable. The Court of Appeal declined to regard H as a fellow-servant, for there was no contract of

(a) (1876), 1 Q. B. D. 252.

(b) [1917] 2 K. B. at pp. 913—915 (W. Cases. 61).

(c) *Maidment v. Cohen, Ltd.* (1938), 60 Ll. L. Rep. 245. In *Lomas v. Jones & Son*, [1944] K. B. 4, du Parcq, L.J., decided the case on the principle of *Wright v. L. & N. W. Ry.* (*supra*); Lord Greene, M.R., and Goddard, L.J., declined to commit themselves on this point and based their decision on another ground; with respect, it is difficult to see why they did not accept the view of du Parcq, L.J.

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employment, express or implied; and they did not conceal their distaste for the application of the doctrine of common employment to this type of case. It is submitted that an even broader view might be taken of facts like these, where the invitation (not being a contract) to take part in the transaction came, not from the servants of the defendants, but from the *defendants themselves*. Here, common employment seems to have nothing to do with the case. If the transaction takes place on the defendant's premises, then his liability should be determined solely, as Scrutton, L.J., indicated, on the duty of an occupier of premises to a person coming there on his invitation or by his licence. As will be seen in Chapter XXII (*post*) this duty is a higher one towards an "invitee" (one who comes on business common to himself and to the defendant) than towards a "licensee" (one who comes solely on his own business) (d). If the transaction occurs in some place not in the occupation of the defendant, e.g., on the highway, then the defendant's liability ought to be resolved on the ordinary principles of the tort of negligence. By asking the plaintiff to help him, he has put himself under a legal duty to use reasonable care towards him and if he breaks that duty and there is no assent by the plaintiff to the danger which injured him, then the defendant ought to be liable (e). In *Colman v. Isaac Croft & Sons* (f), X, a bricklayer employed by the defendants, volunteered, at their request, to assist Y, a fellow-servant, in loading and unloading a lorry driven by Y. X was killed by Y's negligent driving. It was held that the defendants were liable, for common employment was inapplicable, since X's volunteering had nothing to do with driving the lorry.

Limits of
common
employment.
(1) At com-
mon law.

Limits of the doctrine of common employment.—(1) At Common Law. A servant does not, even at Common Law, accept all the risks of employment. The law on this point was restated by the House of Lords in *Wilsons & Clyde Coal Co. v. English* (g), and their conclusions may be thus summarised: ✓

(d) It is difficult to follow Neville, J.'s judgment on this point, [1917] 2 K. B. at pp. 917–918.

(e) And this ought to be so in cases of real emergency. Cf. *Cutler v. United Dairies (London), Ltd.*, [1933] 2 K. B. 297, 305, 306–307.

(f) [1947] 1 K. B. 75. The National Insurance (Industrial Injuries) Act, 1916, s. 9, makes specific provision with respect to cases of this sort in the employments covered by the Act.

(g) [1938] A. C. 57 (W. Cases, 55).

✓(i) The employer is bound to take reasonable care for the safety of the servant by providing (a) a competent staff of men; and (b) proper and safe plant and appliances for the work (h); and (c) a proper system of conducting his work and efficient supervision of it (i).

✓(ii) The duty, whether statutory (k) or arising at Common Law, is a personal one (l) in the sense that if the employer delegates its performance to another, who proves to be negligent, the employer remains liable, no matter how careful he was in the selection of his delegate; nor can he take refuge in the plea of common employment. Of course, there are occasions on which, as a matter of practical necessity, the employer must procure some foreman or other superior servant to carry out the duty; nay, there are occasions in which by statute he must do so: e.g., the owner of a mine, which is required to be under the control of a manager, is forbidden by the Coal Mines Act, 1911 (1 & 2 Geo. 5, c. 50), s. 2(4), to take any part in the technical management of the mine unless he is qualified to be a manager; nevertheless, he will still be liable if such a delegate is negligent in performing the duty on his behalf. Indeed, if the law were otherwise, what would be left of the duty if the employer were an infant, or inexperienced, or the director of a great industrial company who lives nowhere near its works and may never even have visited them?

✓(iii) The duty is not an absolute one. The employer does/

(h) This duty also includes liability for an injury sustained by the employee while doing something which, though not part of his work, is normally and reasonably incidental to it; *Davidson v. Handley Page, Ltd.*, [1945] 1 A. E. R. 235, 237—238 (employee injured by slipping on a greasy duckboard while she was washing a teacup for her own use).

(i) "System of working" was examined by Lord Greene, M.R., in *Speed v. Thomas Swift & Co., Ltd.*, [1943] K. B. 557, 563—564; its meaning depends on the particular facts of each case. Lord Greene's analysis was approved by the House of Lords in *Colfar v. Coggins and Griffith (Liverpool), Ltd.*, [1945] A. C. 197; but the House thought that his conclusions could not be extended any farther with respect to the employer's responsibility. In *Deyong v. Shenburn*, [1916] 1 K. B. 227, the C.A. held that the duty to provide a safe system does not extend to taking reasonable steps to prevent loss of the servant's clothes by theft, and that the employer is not liable for such loss even if the clothes stolen were being used by the servant in his work, provided he was not under any legal obligation to the employer to use them in his work. See, too, *Porter v. Liverpool Stevedoring Co., Ltd.*, [1944] 2 A. E. R. 411; *Garcia v. Harland and Wolff, Ltd.*, [1943] K. B. 731; *Rees v. Cambrian Works, Ltd.* (1946), 62 T. L. R. 512; *Whitby v. Burt, Boulton & Hayward, Ltd.*, [1947] K. B. 918.

(k) A statute may, of course, modify the duty; *post*, p. 139.

(l) Cf. *The Napier Star*, [1939] P. 330 (duty merely public).

§ 32.

not "warrant" the adequacy of the plant, the competence of fellow-servants, or the propriety of the system of work. He fulfils his obligation by exercising due care and skill, but not by entrusting its discharge to employees who prove to be negligent, even though he picked them with due care and skill. In this connexion there is a marked difference between the system provided by the employer and its working by fellow-servants of the injured servant. If the employer has provided a reasonably safe system, he is not to blame if an accident is caused by the casual negligence of a fellow-servant in working the system. Where a whole system of blasting in a quarry was defective, the employer was liable for an accident caused by it to an employee (m); so, too, in *Wilson's Case* itself, the appellants were held liable because a haulage system in their mine was so defective that a workman was crushed to death (n). But where a workman was killed by a fellow-workman's obstruction of a proper system of ventilation, the employer was not liable (o). The master is not responsible for "isolated or day to day acts of the servant of which the master is not presumed to be aware and which he cannot guard against" (p).

The mere occurrence of an accident, which there is no evidence to connect with any personal negligence of the master, will not render him liable: e.g., where a pane of plate-glass insecurely fastened in a folding-door falls upon the servant's hand and there is nothing to show that the insecurity

(m) *Sword v. Cameron* (1839), 1 D. 493. Cf. [1938] A. C. at p. 67.

(n) Other examples are *Monaghan v. Rhodes*, [1920] 1 K. B. 187; *Baker v. James*, [1921] 2 K. B. 674; *Russell v. Criterion Film Production* (1936), 53 T. L. R. 117; *Naismith v. London Film Productions, Ltd.*, [1939] 1 A. E. R. 794 (where the duty was sharply distinguished from that under the rule in *Indermaur v. Dames*, post, § 164).

(o) *Wilson v. Merry* (1868), L. R. 1 H. L. (Sc. 326). The principles set forth in *Wilson's Case* (supra) had been obscured by the earlier decision of the C. A. in *Rudd v. Elder Dempster & Co.*, [1933] 1 K. B. 566 (overruled in *Lochgelly Iron and Coal Co. v. McMullan*, [1934] A. C. 1), and by their dicta in *Fanton v. Denville*, [1932] 2 K. B. 309, which were rejected in *Wilson's Case*. The actual result of *Fanton's Case* was not, however held to be wrong.

Several moot questions arise from *Wilson's Case*. I have discussed these in W. Cases (3rd ed.), at pp. 60—61. I might add to them here the question whether the employer's duties, as defined in *Wilson's Case*, are modified by his employment of an independent contractor who proves to be negligent. I submit that they are not, for otherwise the employer might easily shuffle out of what the law regards as a stringent obligation; moreover, in many cases he would find it difficult to delegate his duties except to an independent contractor.

(p) *Colfar v. Coggins and Griffith, Ltd.*, [1945] A. C. 197, 203.

was known to the master or that it was due any more to his carelessness than to that of a fellow-servant (q).

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There is, perhaps, another qualification of the doctrine of common employment. It was pointed out (*ante*, p. 119) that A may arrange that his servant, B, shall be temporarily employed by C. If, while thus employed, B is injured by the negligence of D, another servant of C, and B sues C, it is probable that C cannot successfully plead that B and D were in common employment. The doctrine is quite harsh enough without any artificial extension (r). It should be observed that strong dissatisfaction with the doctrine of common employment has been recently expressed in the highest judicial quarters, although it is admitted that it is only by legislation that it can be entirely abolished. (See Preface.)

(2) By statute.—The doctrine of common employment was extremely unpopular with the working class. For years their trade unions maintained an incessant agitation for its abolition, but it was not until 1877 that a Select Committee of the House of Commons was appointed to consider the matter. As a result of their recommendations the Employers' Liability Act, 1880 (s), made a tentative and partial modification of the doctrine. The Workmen's Compensation Act, 1897 (t), conceded the principle of abolition, but worked it out so unskilfully that one part of the workmen of the country were more advantageously placed than any other members of the community solely because they were workmen, whilst the other part were less advantageously placed for exactly the same reason (u). During the present century various amending Acts have passed, culminating in the Workmen's Compensation Act, 1925 (a). This Act has been replaced by the National Insurance (Industrial Injuries) Act, 1946 (b). It compels insurance of servants against personal injury in the

(2) By statute.

(q) *Cole v. De Trafford* (No. 2), [1918] 2 K. B. 528; that was why the maxim *res ipsa loquitur* (*post*, § 124) did not apply. The accident certainly "talked", but it gave no information about the defendants' personal negligence, pp. 528–529, 538.

(r) *Lambert v. Constable* (1910). 163 L. T. 194.

(s) 43 & 44 Vict. c. 42. It is still in force.

(t) 60 & 61 Vict. c. 37.

(u) *Century of Law Reform* (1901), 268–277.

(a) 15 & 16 Geo. 5, c. 84; amended by the Workmen's Compensation Act, 1943 (6 & 7 Geo. 6, c. 6), and later legislation.

(b) 9 & 10 Geo. 6, c. 62, s. 89 and Sched. IX. The Act comes into force July 5, 1948. A commentary on it is Shannon and Potter, *National Insurance (Industrial Injuries) Act, 1946*.

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employments specified in the Act. Both employer and employee must contribute to the insurance. The injury must be one "arising out of and in the course of" the employment. If the employee was, at the time of the accident, disobeying any statutory or other regulations applicable to his employment, or if he was disobeying his employer's orders, the accident shall nevertheless be deemed to arise out of and in the course of the employment, provided (i) the accident would have been deemed so to have arisen if there had been no disobedience, and (ii) the act was done for the purposes of, and in connection with, the employer's trade or business (c). The employments covered by the Act cannot be enumerated here; subject to specified exceptions, they include any contract of service (d).

Statutory
duty of
employer.

✓ Where the employer is under a statutory duty to provide for the safety of his workmen, the following points must be noticed :—

(i) May
exclude
common
employment.

✓ (i) It has been laid down that the defence of common employment is not open to an employer when the cause of action against him is based on the breach of some absolute statutory duty. Perhaps a safer way of stating the rule is to say that a statute may be cast in such terms as to make the employer liable for harm suffered by his employee even if the injury be due to the misconduct of a fellow-servant or would otherwise fall within the doctrine of common employment; and that it is purely a question of construction whether any particular statute has this effect. This, and no more, is what "absolute" means in this connexion, and this, and no more, is what was decided in *Groves v. Wimborne* (e), where the employer was under a statutory obligation to fence machinery, and the fencing which he had put up was removed (how or by whom is not stated in the report) and the plaintiff, an employee, lost his arm in consequence. It was held upon the construction of the statute that the defendant was liable, and that common employment was no defence. But Vaughan Williams, L.J., declined to take the view that in no circumstances whatever can common employment be successfully pleaded to an action on a statutory duty; and he thought that it might be a defence if the employer proved that he had

(c) *Ibid.*, s. 8.

(d) *Ibid.*, Sched. I.

(e) [1898] 2 Q. B. 402. Approved in *Lochgelly Iron and Coal Co. v. McMullan*, [1934] A. C. 1.

set up completely adequate machinery and fencing and that the fencing had been removed by a fellow-servant of the injured employee (f), and the judgments of A. L. Smith and Rigby, L.J.J., are not inconsistent with this (g).

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(ii) *Volenti non fit injuria* cannot be pleaded by an employer as a defence to a breach of a statutory duty (h). In 1933, the Court of Appeal, in *Wheeler v. New Merton Board Mills, Ltd.* (i), affirmed this rule which had been laid down about fifty years earlier by a Divisional Court in *Baddeley v. Granville* (k) apparently upon the ground that the law will not allow an employer to make it a term of his servant's contract that the servant shall connive at a breach of his employer's statutory obligation which is intended for the benefit of not only that servant but of others as well (l). But Scrutton, L.J., in the later case found it difficult to elicit the real reason (m) and he and his brethren followed *Baddeley's Case* chiefly because it was inexpedient to upset a decision which had been acted upon for so many years by insurance companies and others.

(ii) Excludes *Volenti* etc.

It was settled by the House of Lords in 1939 that contributory negligence of the servant is a defence to the employer's breach of a statutory obligation (n), provided (as in any other case of contributory negligence) it was the substantial cause of the accident (o). The argument that the object of the Legislature is to protect the workman to the extent of making the employer an insurer of him, irrespective

(iii) Contributory negligence a defence.

(f) [1898] 2 Q. B. at pp. 418-419.

(g) Vaughan Williams, L.J., was cited by Scrutton, L.J., in *Rudd v. Elder Dempster & Co., Ltd.*, [1933] 1 K. B. 566, 582-583. *Rudd's Case* was disapproved in *Lochgelly Iron and Coal Co., Ltd. v. McMullan*, [1934] A. C. 1, but on grounds not affecting this point. Nor does Talbot, J.'s criticism of Vaughan Williams, L.J., in *Wheeler v. New Merton Board Mills, Ltd.*, [1933] 2 K. B. 669, 673-675, affect the point in the text (*supra*)—that it is a question of construction whether a statute excludes the doctrine of common employment. See, too, *The Napier Star*, [1939] P. 330; *Potts v. Reid*, [1942] 2 A. E. R. 161, 172.

(h) The Employers' Liability Act, 1880, is perhaps an exception; *Yarmouth v. France* (1887), 19 Q. B. D. 647; *Smith v. Baker*, [1891] A. C. 325.

(i) [1933] 2 K. B. 669.

(k) (1887), 19 Q. B. D. 423.

(l) Wills, J., at pp. 426-427.

(m) [1933] 2 K. B. at pp. 690-691.

(n) *Caswell v. Powell Duffryn Collieries, Ltd.*, [1940] A. C. 152. Applied in *Gibby v. East Grinstead Gas Co.*, [1944] 1 A. E. R. 358.

(o) See, as to proof of causation, *Stimpson v. Standard Telephone, etc., Ltd.*, [1940] 1 K. B. 342.

§ 32.

of the workman's carelessness (*p*), was rejected in favour of the view, recognised in earlier decisions of the Court of Appeal, that, if the workman himself caused the accident, he cannot recover (*q*). Moreover, the House refused to draw any distinction between contributory negligence which consists in grave misconduct and that which consists in mere carelessness (*r*). At the same time, it was recognised in favour of the worker in a factory or a mine that the noise, strain, constant repetition of the same processes and manifold risks to which he is exposed may make him less attentive to his own safety; but that is no more than saying that the amount of care which a man must take varies with circumstances (*s*). Contributory negligence in cases that come within the National Insurance (Industrial Injuries) Act, 1946, is no defence where section 8 of the Act (*ante*, p. 140) is applicable.

Strict duty
of employer.

It is uncertain whether common employment is any defence where the servant is injured by a breach on the part of his employer of a strict (or, as it is sometimes called, "absolute") duty at Common Law. Arguments from statutory "absolute" duties are useless, because each statute depends on its own particular interpretation.

In *Knott v. London County Council* (*t*), the plaintiff was a charwoman employed by the defendants as a cleaner at one of their schools. The school-keeper, a fellow-servant, lived on the premises and kept a dog as a pet, but not as a watchdog. The dog was savage to his knowledge. It bit the plaintiff. Now a person in control of a savage animal is under a strict duty to prevent it from injuring other people: *i.e.*, if the animal mauls any one, it is unnecessary for the plaintiff to prove negligence on the part of the controller. Here the defendants were held not liable by the Divisional Court, first, because the school-keeper's knowledge of the dog's ferocity was not, in the circumstances, imputable to the defendants;

(*p*) The Workmen's Compensation Act, 1925, went very far in this direction: *Harris v. Associated Portland Cement Manufacturers, Ltd.*, [1939] A. C. 71. What is said in the text (*supra*) had no application to claims under that Act. (The Act was repealed by the National Insurance (Industrial Injuries) Act, 1946; *ante*, p. 139.)

(*q*) Lord Atkin, [1940] A. C. at pp. 161—165. See, too, *Lewis v. Denye*, [1940] A. C. 921.

(*r*) Lord Wright, [1940] A. C. at p. 178.

(*s*) Cf. *Hutchinson v. L. & N. E. Ry.*, [1942] 1 K. B. 481. For contributory negligence as a defence in general to a breach of statutory obligation, see § 126, *post*.

(*t*) [1934] 1 K. B. 126.

and, secondly, because the defendants had not control of the dog. The Court had held, to begin with, that common employment was no defence, but the authority upon which they based this was not really in point. The Court of Appeal affirmed the decision on both grounds taken by the Divisional Court (u). Lord Wright, in referring to common employment as a defence to an action for breach of a strict duty, said *obiter*, "it may, however, well be that in such cases the defence of common employment has no place" (a).

✓ The problem is therefore still unsettled. Perhaps the answer to it lies upon the following lines. There are several varieties of strict duties and their ingredients are not all the same (b). Thus the rule in *Rylands v. Fletcher* (c) is more stringent than the rule in *Indermaur v. Dames* (d) (duty to make premises reasonably safe for persons coming there for business purposes). It is suggested that the question whether common employment is a defence depends on the particular kind of strict duty under consideration, its connexion with the employment and whether its breach is a risk of the employment which the servant must be deemed to have undertaken. It seems that common employment is a defence to the rule in *Indermaur v. Dames* (*supra*) (e). How far it extends beyond that is at present unknown.

(u) Lord Hewart, C.J., did not expressly refer to the second ground.

(a) At p. 140.

(b) *Post*, Ch. XIX.

(c) (1868), L. R. 3 H. L. 330 (*post*, § 140).

(d) (1886), L. R. 1 C. P. 274; 2 C. P. 311 (*post*, § 164).

(e) Lord Wright, in *Knott v. L. C. C.*, [1934] 1 K. B. 126, 138.

CHAPTER IV

REMEDIES

§§ 33, 34.

§ 33. It has already been pointed out that the commonest remedy for a tort is an action for unliquidated damages and that this is one of the chief ~~characteristics of tortious~~ liability (a). But it was also indicated that there are other remedies. They are self-help, action for an injunction and action for specific restitution of property. These four remedies will now be examined in detail.

(1) Self-help.

§ 34. Self-help. ✓

In speaking of private defence, a distinction was made between it and self-help, and it need not be repeated here (b). Self-help is apt to be a perilous remedy, for the person exercising it is probably the worst judge of exactly how much he is entitled to do without exceeding his rights. Still it is well recognised as a remedy for certain torts. A trespasser, or trespassing animal, may be expelled with no more force than is reasonable. A building set up by a trespasser may be pulled down, nor is it necessary to notify the trespasser of one's intention to do so, unless the building is inhabited; then reasonable notice to quit is required, for it is not permissible to assert one's rights by knocking a house about the ears of its occupants without giving them an opportunity of evacuation. This is certainly the law with respect to removal by a commoner of a building which is unlawfully erected on land over which he has a right of common (c), and it is probably necessary to give such notice where the trespasser has built upon any land, whether subject to rights of common or not (d).

Again, goods wrongfully taken may be peaceably retaken; and chattels of another which encumber one's land may be

(a) *Ante*, § 5.

(b) *Ante*, pp. 49—50.

(c) *Perry v. Fitzhove* (1846), 8 Q. B. 767; *Davies v. Williams* (1851), 16 Q. B. 546; *Jones v. Jones* (1862), 1 H. & C. 1.

(d) *Burling v. Read* (1850), 11 Q. B. 904, might appear to be the other way, but the fifth plea in that case (at p. 906) seems to indicate that the trespasser had notice that the owner intended to destroy the building. See, too, *Chitty, J.*, in *Lane v. Capsey*, [1891] 3 Ch. 411, 415—416.

detained until adequate compensation is paid for the harm they have done, such detention being technically known as "distress damage feasant". All these forms of self-help will be considered more fully under the chapters on trespass and conversion (e).

§ 34.

✓ A nuisance may be abated, i.e., removed. But this is a remedy which the law does not favour because, as Sir Matthew Hale said, "this many times occasions tumults and disorders" (f). In the first place, before abatement is attempted, notice should be given to the offending party to remedy the nuisance, unless it be one of omission and the security of lives and property does not allow time for notice (g), or unless the nuisance can be removed by the abator without entry on the wrongdoer's land, e.g., the branches of a neighbour's tree which project over or into my land may be sawn off by me without notice to him (h), although I must not appropriate what I sever (i). The law as to notice is, however, not quite certain beyond this. During the last century it has veered from the view that notice need be given only exceptionally to the view that notice ought always to be given subject to the exceptions just stated (k). The explanation is that the riper a system of law becomes the more it tends to restrict self-help. Secondly, unnecessary damage must not be done: e.g., tearing up a picture which is publicly exhibited and which is a libel on oneself is too drastic, even though it be a nuisance (l). Thirdly, where there are two ways of abatement, the less mischievous should be followed unless it would inflict some wrong on an innocent third party or on the public (m): →

Abatement
of nuisance.

(e) *Post*, Chaps. XII, XIV.

(f) De Portubus Maris, Pt. 2, Ch. VII.

(g) Lord Atkinson, in *Lagan Navigation Co. v. Lambeg, etc., Bleaching Co., Ltd.*, [1927] A. C. 226, 244—245.

(h) *Lemmon v. Webb*, [1895] A. C. 1. Roots of a tree projecting into one's soil from neighbouring land may be sawn off, but it is not clear whether notice to the neighbouring land occupier must first be given. *Butler v. Standard Telephones, etc., Ltd.*, [1940] 1 K. B. 399.

(i) *Mills v. Brooker*, [1919] 1 K. B. 555.

(k) Compare *Jones v. Williams* (1843), 11 M. & W. 176 with *Lemmon v. Webb*, [1895] A. C. 1, and the *Lagan Navigation Co. Case*, [1927] A. C. 226; and see Salmond, § 45 (7).

(l) *Du Bost v. Beresford* (1810), 2 Camp. 511, where the point was left open, but it may probably be regarded as settled now.

(m) Blackburn, J., in *Roberts v. Rose* (1865), L. R. 1 Ex. 82, 89; adopted by Lord Atkinson, in *Lagan Navigation Co. v. Lambeg, etc., Bleaching Co., Ltd.*, [1927] A. C. 226, 244—246, where the abators satisfied none of these three conditions.

§ 35.

§ 35. Action for damages (n).

(2) Damages.

(i) Contemptuous.

There are several varieties of damages :

(i) Contemptuous.—The amount awarded here is merely derisory—usually one farthing—and indicates that the Court has formed a very low opinion of the plaintiff's bare legal claim, or that his conduct was such that he deserved, at any rate morally, what the defendant did to him. Damages of this kind may imperil the plaintiff's chances of getting his costs, for although costs now usually follow the event of the action, yet their award is in the discretion of the Judge, and although the insignificance of damages is not by itself enough to justify him in depriving the plaintiff of his costs, yet it is a material factor in the exercise of his discretion. Contemptuous damages are not uncommon in libel actions. Thus in *Kelly v. Sherlock* (o), the defendant in his newspaper had libelled the plaintiff in violent terms, but the plaintiff had retorted with a counter-attack so vitriolic (he stigmatised the defendant's newspaper as "the dregs of provincial journalism") that he got no more than a farthing damages.

(ii) Nominal.

(ii) Nominal.—These are awarded when the plaintiff's legal right has been infringed, but the tort is one of a kind which is actionable per se, i.e., without proof of damage, or, as the phrase is, where it gives rise to injuria sine damno. Trespass, whether to the person or to property, is an example of this. "If a man," said Holt, C.J., in *Ashby v. White* (p), "gives another a cuff on the ear, though it cost him nothing, no not so much as a little diachylon (q), yet he shall have his action, for it is a personal injury". And the popular idea that trespass to land is not actionable unless damage be done is quite as erroneous as another popular idea that trespassers can be prosecuted (r).

Nominal damages, therefore, do not connote any moral obligity on the plaintiff's part. They do not exceed 40s. and may vary from that amount to 1s. or (but this is unusual)

(n) The chief monographs are Mayne, *Damages* (10th ed. 1927); Arnold, *Damages and Compensation* (2nd ed. 1919); Gahan, *Law of Damages* (1936).

(o) (1865), L. R. 1 Q. B. 686.

(p) (1703), 2 Ld. Ra., m., 938, 955.

(q) Plaster. The word still appears in current dictionaries. Its history is given in the *New English Dictionary*. In Holt's time it was described as "The Common Plaster call'd Diachylon".

(r) *Post* Ch XII

one farthing (s). Yet even here the Judge may in his discretion deprive the plaintiff of his costs or even make him pay the costs of both sides (t).

§ 35.

(iii) Ordinary or substantial.—This is the type which is commonly awarded. It is intended to represent fair and adequate compensation for the plaintiff's injury. But what he will recover is compensation, not restitution. In *Moss v. Christchurch R. D. C.* (u), M owned a cottage which he had let to X on a weekly tenancy. It was almost completely destroyed by a fire caused by a 'spark from defendants' steam-roller which was held to be a nuisance. In an action by M, it was held that the measure of damage was not the fair cost of rebuilding the cottage and making it as good and habitable as before, but the difference between the money value of M's interest before and after the fire. Hence there are some cases in which more than replacement value will be recoverable: e.g., if a historic mansion be burned down, no one would suggest that the mere cost of replacing the old bricks by new ones would fairly represent the actual loss; and there are other cases in which less than the replacement value will be recoverable; as in *Moss's Case*, or where local authorities have condemned a building as unsafe and it is negligently burned down by a stranger before it can be pulled down by the owner.

The amount of damages for injury to a chattel is not to be reduced by the fact that the plaintiff has diminished his loss by a sale of the chattel after the injury had been inflicted, unless the defendant can prove that the price was as good as if the chattel had not been injured. What the plaintiff does with his chattel is in general no concern of the defendant (a). If you wrongfully take away my chair and keep it for a year, it will not help you to show that I did not

(s) *Mostyn v. Coles* (1862), 7 H. & N. 872.

(t) Arnold, *op. cit.*, 6; but he cannot be ordered to pay the costs of both sides if he has been completely successful and there has been no misconduct on his part: *Kierson v. Thompson & Sons, Ltd.*, [1913] 1 K. B. 587. If nominal damages are awarded in an action for waste, judgment may be entered for the defendant: *Harrow School v. Alderton* (1800), 2 B. & C. 86; *Doherty v. Allman* (1878), 3 App. Cas. 709, 725. But this rule is peculiar to waste; it is of considerable antiquity and was based upon the maxim *de minimis non curat lex*: Y. B. Mich. 19 Hen. 6, pl. 19, f. 8b; Br. Abr. Waste, 123; Coke, 2 Inst. 306.

(u) [1925] 2 K. B. 750.

(a) *The London Corporation*, [1935] P. 70.

§ 35. usually sit in that chair (b); or if you injure my ship and some friend of mine repairs it free of charge, you must still pay for the damage you have done (c).

(iv) Exemplary. (iv) Exemplary or vindictive (d).—In contemptuous damages we have seen that the Court can take into account the plaintiff's moral conduct. In exemplary damages it can punish the defendant for misbehaviour. These represent the jury's indignation at an especially outrageous attack on the plaintiff's security, or at wanton misconduct on the defendant's part. The former is illustrated by the cases deciding against the legality of the search warrants which were issued against John Wilkes and others during the latter part of the eighteenth century. In *Huckle v. Money*, the plaintiff was detained under one of these warrants for no more than six hours and the defendant "used him very civilly by treating him with beef-steaks and beer". Yet the Court refused to interfere with a verdict for £300 damages, for "to enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition . . . it [is] a most daring public attack made upon the liberty of the subject" (e).

Merest v. Harvey (f) exemplifies the second kind of exemplary damages. The plaintiff had a shooting-party on his own estate which adjoined the highway. The defendant, who was a banker, a magistrate and a Member of Parliament, and who had dined and drunk freely, left his carriage on the highway and insisted with oaths and threats in joining in the sport. The plaintiff, who behaved throughout with laudable and dignified coolness, received £500 damages for the trespass (g).

If damages given by a jury be too great or too small in amount, a new trial may be ordered. But the Courts dislike interfering with a verdict in this way and they will do so only if it is such a perverse one that no twelve reasonable men could have found it (h). Where the Judge sits without a

(b) Lord Halsbury, C., in *The Mediana*, [1900] A. C. 113, 117.

(c) Hannen, J., in *The Endeavour* (1890), 62 L. T. 840, 841; *Liffen v. Watson*, [1940] 1 K. B. 556.

(d) Other names for them are "retributory", "punitive", "aggravated", "liberal", "penal", "sentimental".

(e) (1763), 2 Wils. 205, 207.

(f) (1814), 5 Taunt. 442.

(g) See, too, *Bell v. M. Ry.* (1861). 10 C. B. (n.s.) 287.

(h) *Mayne, op. cit.* 581-586.

jury, his assessment of damages will not be varied on appeal unless he acted upon some wrong principle of law or the amount which he awarded was so extremely high or so very small as to make it an entirely erroneous estimate of the damages to which the plaintiff is entitled (i). Whether the trial was with, or without, a jury, the Appeal Court certainly will not alter the amount awarded merely because it is not exactly what they themselves would have awarded if the case had been triable by them in the first instance.

§ 35.

Successive actions on the same facts.—It may happen that the plaintiff, after he has recovered damages for his injury, finds that new, or hitherto undiscovered, evil effects flow from it and that he desires to bring a second action to recover further damages. In general he cannot do this. (The rule is that where damages result from one and the same cause of action, they must be assessed once for all.) Coke's reason for this was "interest reipublicae ut sit finis litium". Other writers prefer to regard it as "nemo bis vexari pro eadem causa". Best, C.J., seems to embody the ideas in both these maxims in homely English: "Here the cause of action is complete, for the whole thing has but one neck, and that neck was cut off by one act of the defendant. . . . It would be most mischievous to say—it would be increasing litigation to say—'You shall not have all you are entitled to in your first action, but you shall be driven to a second, a third, or a fourth action' " (j). This shows that the rule may occasionally benefit the injured party, but it is much more likely to benefit the defendant.

Successive
actions not
allowed.

✓ It certainly did so in Fetter v. Beal (k). The plaintiff recovered £11 damages against the defendant for beating him. Eight years later he brought a second action because, after the first, a portion of his skull had to be removed by trepanning. Judgment was given for the defendant. No real reason was given for the decision except the novelty of the action and the assertion that the rule was settled; and it seems to be wrong on principle. If the plaintiff had been allowed to recover, there would have been no violation of either of the Latin maxims above. How can a man be said

(i) *Owen v. Sykes*, [1936] 1 K. B. 192.

(j) *Richardson v. Mellish* (1824), 2 Bing. 229, 240.

(k) (1701), 1 Ld. Raym., 339, 692; *alias Fetter v. Veal*, 12 Mod. 542.

§ 35. ✓ to indulge in vexatious litigation if he did not know the extent of his injury when he sued his first action? (l).

Cases outside the rule.

There are several cases which fall outside the rule. They can scarcely be described as exceptions to it, for in general the rule applies only where the facts are the same and in these cases they are not.

(i) Two distinct rights violated.

(i) Where two distinct rights are violated.—In *Brunsdon v. Humphrey* (m), a cab-driver by the negligence of the defendant, suffered injuries to his cab and to his body. He recovered damages for the harm to the cab and was held entitled to bring a second action for his personal injuries, for they were caused by the violation of a different right (n). It thus appears that if an accident injures a man's leg, he may bring one action for the leg and another for the torn trouser which encased it. Lord Coleridge, C.J., the dissenting Judge, criticised this as a subtlety not warranted by the law. But that is not invariably so, for, as Bowen, L.J., pointed out (o) there are at least four respects in which a claim for personal injuries may differ from one for injuries to property. They may be barred by variant periods of time, the defences are not the same, damage in the one case may be direct and in the other it may be merely consequential, and finally questions of identity about the person injured may arise which can have no application to injured property (p).

Several tests have been suggested for determining whether the causes of action are the same. A useful (but not exclusive) one appears to be: "Would the evidence required to support the first cause of action have been sufficient to support the second?" If aye, then there is only one cause of action (q).

(l) See Brett, M.R., in *Brunsdon v. Humphrey* (1884), 14 Q. B. D. 141, 144—145.

(m) (1884), 14 Q. B. D. 141 (W. Cases, 65).

(n) It is almost impossible to make out from the facts as stated in either the Court below (11 Q. B. D. 712) or in the Court of Appeal whether the plaintiff knew of the extent of his personal injury at the date of his first action.

(o) 14 Q. B. D., at p. 149.

(p) Other examples of (i) are *Guest v. Warren* (1854), 9 Ex. 379; *Gibbs v. Cruikshank* (1873), L. R. 8 C. P. 454; *Townsend v. Bishop*, [1939] 1 A. E. R. 805; *Johnson v. Cartledge*, [1939] 3 A. E. R. 654; *The Oropesa*, [1943] P. 32. No second action is permissible for a merely different head of damage (which might have been claimed in the first action), for that is not a separate cause of action: *Derrick v. Williams*, [1939] 2 A. E. R. 559.

(q) Brett, M.R., and Bowen, L.J., in *Brunsdon v. Humphrey*, 14 Q. B. D. at pp. 145, 147.

(ii) Where the injury is a continuing one.—An example of this is continuing nuisance. In *Fetter v. Beal* (ante) the Court recognised this exception as well established. Here successive actions can be brought for every fresh injury. But when the first action is brought damages are assessable only up to the date of assessment in that action. Prospective damages, however probable their occurrence may be, cannot be claimed, for that may be unfair to the defendant, since it is quite possible that he may discontinue the cause of injury at once. In *Darley Main Colliery v. Mitchell* (r), lessees of the coal seam under Mitchell's land worked the coal so as to cause a subsidence of the land and injury to houses on it in 1868. The lessees compensated Mitchell for this injury. In 1882 a further subsidence took place causing further injury. There would have been no further subsidence if X, an adjoining owner, had not worked his own coal, or if the lessees had left enough support under Mitchell's land. Mitchell sued the lessees for the additional subsidence, and the House of Lords held that he could recover because the cause of action did not arise until this second collapse occurred.

§ 38.

(ii) Injury a continuing one.

✓ A logical consequence of *Mitchell's Case* was the decision in *West Leigh Colliery Co. v. Tunncliffe & Hampson, Ltd.* (s), where it was held that in assessing damages for subsidence of this kind the depreciation in the market value of the property attributable to the risk of future subsidence must not be taken into account, but that the surface owner must wait until the injury caused by such future subsidence shall have occurred. Here there was a claim for £1,300 for such collapse as had already taken place and for £13,200 for risk of future collapse, and this latter claim was not allowed. The decision was also one of the House of Lords and only legislation can alter the law embodied in it; but it does appear to create hardship for the surface owner who, if he wishes to sell his land, must find a purchaser who is willing to buy the probability of a law suit with it.

(iii) Where the tort is actionable only on proof of special damage.—It has already been pointed out that some torts are actionable *per se*, i.e., without proof of special damage. For others no action will lie unless such damage be proved.

(iii) Tort actionable only on proof of damage.

(r) (1886), 11 App. Cas. 127; distinguished in *Alan Maberley v. Peabody & Co., Ltd.*, [1946] 2 A. E. R. 192, 194.

(s) [1908] A. C. 27.

§ 35.

Do these constitute an exception to the rule that successive actions are not maintainable? The answer, Sir John Salmond considered, is doubtful (t). An example which he put was that of slander actionable only on proof of special damage. Suppose that by reason of such a slander the person defamed loses employment with A, and, after obtaining employment with B, loses that too, has he a single cause of action for the whole damage or a separate cause of action for each head of damage? The authorities are in conflict as there are irreconcilable *dicta* in *Darley Main Colliery v. Mitchell* (u); nor are the text-books in agreement (a).

The solution of the question seems to lie in the application of the principle that, where the causes of action are the same, a second action is not maintainable. As we have stated, one good test for determining whether they are the same is, "Are the facts that are required to establish the second claim substantially the same as those that established the first?" Now, in the particular case of a slander causing a dismissal of the plaintiff, first by A and then by B, the facts are not substantially the same, and therefore there appear to be separate causes of action. It may well be that B's dismissal of the plaintiff is too remote a consequence from the original slander; if so, the plaintiff will lose his action on that ground. It may be, too, that he is trying to pester the slanderer by two actions which could well be covered by one; if so, the Court has quite sufficient inherent jurisdiction to prevent such an abuse of procedure. In fact, the defendant seems to be well protected against any abuse by the plaintiff of a right to bring a second action if such a right were allowed him; and to deny it to him is really to punish him for a fact over which he has no control—that all the consequences of a wrongful act do not always occur at once. But there may be other cases of torts actionable per se in which the causes of action are not separate, because the facts are substantially the same; e.g., battery which proves to be more serious in its effects than was realised when the first action was brought

(t) Torts, § 35 (10); discussed more fully in 7th ed., § 37 (10).

(u) (1886), 11 App. Cas. 127; Lords Bramwell (p. 145) and Fitzgerald (p. 151) favoured an affirmative answer; *contra*, Lord Blackburn (pp. 142–143); it is uncertain what Lord Halsbury's view was.

(a) Salmond, Torts, § 35 (10), favours the view that there are separate causes of action. *Contra*, Clerk & Lindsell, Torts, 239–240. Arnold, Damages and Compensation, 214; doubtful, at any rate as to slander.

(*Fetter v. Beal*, ante, p. 149). On this analysis, it is better to take each case on its particular facts rather than to launch into a discussion of the accuracy of the general proposition that the rule as to successive actions has no application to torts actionable only on proof of special damage. §§ 35, 36.

* § 36. Injunction.

(3) Injunction.

An injunction is a judgment or order of the Court restraining the commission or continuance of some wrongful act, or the continuance of some wrongful omission. It was formerly issued only by the Court of Chancery, but the Supreme Court of Judicature (Consolidation) Act, 1925 (b), which replaces a similar provision in the Judicature Act, 1873 (c), enacts that the High Court may grant an injunction in all cases in which it appears to the Court to be just or convenient. These words indicate a limit on the power to issue an injunction which was long ago recognised by the Court of Chancery. The remedy is one in the discretion of the Court; it cannot be demanded as a matter of right, and it will never be granted where damages would be an adequate remedy.

There are several ways of classifying injunctions, but one that cuts across all other divisions is that into *interlocutory* and *perpetual*. An interlocutory injunction is one which is issued provisionally until the hearing of the case upon its merits, or generally until further order. The Court does not profess to anticipate the determination of the dispute but merely indicates that there is a substantial question to be tried. Hence the plaintiff need do no more than prove that he has a fair question to raise as to the existence of the right which he alleges and that that right should be preserved intact until the question can be settled. If on the trial of the action, the plaintiff proves that at all events he is entitled to relief, the Court will make the injunction perpetual; otherwise it will dissolve the injunction (d). A common practice is for

Interlocutory and perpetual

(b) 15 & 16 Geo. 5, c. 49, s. 45.

(c) 36 & 37 Vict. c. 66, s. 25 (8).

(d) Kerr, *Injunctions* (6th ed., 1927), 1—2. Instead of granting an injunction in the first instance, the Court often grants an "interim order" in the nature of an injunction by which defendant is restrained until a particularly named day. The advantage of this is (i) the plaintiff is that he can procure an *interim order ex parte* (i.e., in the absence of his opponent); (ii) the defendant that he need not appear in Court in order to get the order discharged. *Ibid.*, 642—643

§ 36. ✓

Prohibitory
and manda-
tory.

Quia timet
action. ✓

the parties to treat the preliminary hearing as the trial of the action.

Another classification is that into *prohibitory*, where the defendant is forbidden to commit or to continue the injurious act, and *mandatory* where he is ordered to undo the evil that he has done. ✓

It is for the discontinuance of some wrong that an injunction is commonly claimed. If the wrong is merely feared, but not yet committed, the proper remedy is a *quia timet* action. These actions originated at Common Law, and there were several varieties of them (e). Relief of the kind which could be afforded by them is now obtainable by (*inter alia*) the grant of an injunction (f), but it is not procurable unless the plaintiff can show that the apprehended mischief will almost certainly arise. It was unsuccessfully claimed in *Att.-Gen. v. Nottingham Corporation* (g) against the defendants who proposed to erect a small-pox hospital within fifty feet of dwelling-houses, for the plaintiff could not show "a strong probability amounting to a moral certainty that if the hospital were established it would be an actionable nuisance" (h).

As has been said, the main rule as to the issue of injunctions is that they will not be granted if damages would adequately compensate the plaintiff. Subsidiary rules are that the injury must not be merely trifling, as where a clergyman held services on a beach without obstructing anybody (i); and that the conduct of the parties, whether plaintiff or defendant, must be taken into account. High-handed behaviour of the defendant will make the grant of an injunction much more likely: e.g., if, after he has been notified that a motion for an injunction will be made to prevent him from building so as to darken the plaintiff's lights, he hurries on with the building, a mandatory injunction will be issued against him to pull it down (k). On the other hand, the plaintiff will not succeed if he has acquiesced for some time in the defendant's infringement of his rights (l).

(e) Holdsworth, H. E. L., II, 311, note 6.

(f) *Att.-Gen. v. Corporation of Manchester*, [1893] 2 Ch. 87.

(g) [1901] 1 Ch. 673.

(h) *Ibid.*, 677. See, too, *Graigola Merthyr Co., Ltd. v. Swansea Corporation*, [1929] A. C. 344, 353.

(i) *Llandudno U. D. C. v. Woods*, [1899] 2 Ch. 705.

(k) *Daniel v. Ferguson*, [1891] 2 Ch. 27.

(l) *Gaskin v. Ralls* (1879) 13 Ch. D. 324

^ The torts for which an injunction is usually sought are nuisance, continuing trespass, infringement of copyright, trade-marks and patents, and passing-off one's goods as those of another. Probably every tort is redressible by an injunction except assault and battery, false imprisonment and malicious prosecution (m); and according to some writers, even apprehended assault can be prevented in this way, though it is doubted whether the Court would ever exercise its jurisdiction in such circumstances. More probably it would tell the complainant to go to the justices of the peace and ask them to bind over the defendant to keep the peace (n). Slander and libel occupy a peculiar position. It is possible to obtain an interlocutory injunction against them, but the Court will act with great caution, especially in cases of slander. The reason for this is that for well over a century the question whether matter is defamatory or not has been one for the jury ultimately to decide (except where the parties agree to dispense with a jury), and it is therefore a very delicate affair for the Court to anticipate their verdict. Hence it will exercise its jurisdiction only "in the clearest cases, where any jury would say that the matter complained of was libellous, and where, if the jury did not so find, the Court would set aside the verdict as unreasonable" (o).

§ 36.

Damages in lieu of an injunction.—The Court of Chancery had no inherent power to award damages for torts which brought no profit to the wrongdoer, but by Lord Cairns' Act, 1858, the Court was enabled to award damages either in addition to, or in substitution for, an injunction (p), and later legislation has conferred the like jurisdiction on the High Court of Justice (q). But can damages be awarded instead of

Damages
in lieu of
injunction.

(m) Maitland, *Equity* (2nd ed. 1936), 325.

(n) Clerk & Lindsell, *Torts*, 206.

(o) *Bonnard v. Perryman*, [1891] 2 Ch. 269, 284, following Lord Esher, M.R., in *Coulson v. Coulson* (1887), 3 T. L. R. 846. Note that after the trial of the action, the plaintiff, if he has been successful, may get an injunction to restrain further publication of the defamation with no more difficulty than in other torts: *Gatley, Libel and Slander* (3rd ed., 1938), 768–773.

(p) 21 & 22 Vict. c. 27, s. 2.

(q) Lord Cairns' Act was repealed by the Statute Law Revision Act, 1883 (46 & 47 Vict. c. 49), s. 3, but the jurisdiction was preserved by the joint effect of the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 16 (now s. 18 of the Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 Geo. 5, c. 49)) and Statute Law Revision Act, 1898 (61 & 62 Vict. c. 22), s. 1. Kerr, *op. cit.*, 655. For the conditions on which damages will be granted in lieu of an injunction, see A. L. Smith, L.J., in *Shelfer v. London Electric Lighting Co.*, [1895] 1 Ch. 287, 322–323; applied in *Alan Maberley v. Peabody & Co., Ltd.*, [1946] 2 A. E. R. 192, 195.

§§ 36, 37, 38. granting an injunction in a quia timet action? For over thirty years this was a moot point, but in 1924 a bare majority of the House of Lords held in Leeds Industrial Co-operative Society, Ltd. v. Slack (r) that such damages could be awarded. The Court below had found that the appellants' buildings, when completed, would cause an actionable obstruction to the respondent's lights, but that no such obstruction had yet taken place (s).

Specific
restitution

§ 37. Actions for specific restitution of property.

These have a very limited application in the law of tort. They may be for the recovery of land or for the recovery of chattels. An action for the recovery of land is not nowadays an action in tort unless it is joined with a claim for "mesne profits", i.e., a claim for the profits which the defendant made or might have made while he was in possession of the land. Mesne profits are unliquidated damages and are usually tacked to a claim for the land and the remedy to that extent is relevant in the law of tort. But whether it is restitution of land or of goods that is sought, the remedies are confined to cases where one man is in possession of another's property and this limits them to torts infringing such possession. More will be said of them under those heads (t).

Statutory
remedies.

✓ § 38. Statutory remedies: how far exclusive.

Where a statutory duty is imposed upon a person or body of persons and that duty is broken, liability to the penalty under the statute is of course incurred. But apart from that, the question whether an action in tort is maintainable by any one who is injured by the breach of the statute depends on the construction of the particular statute concerned. It is certainly not now law, as Lord Campbell once thought it was (u), that, whenever a statutory duty is created, any

(r) [1924] A. C. 851.

(s) Lord Sumner, one of the dissenting Judges, asked how it could be possible to award money to a person who has not yet suffered a tort? And he also urged that to do so in the circumstances was to fix judicially the price which an intending tortfeasor could pay for a licence to commit a wrong (pp. 867—868). No completely adequate reply was made to these criticisms. Lord Dunedin (at p. 865) thought there *was* a tort because a threat is one. But, although some threats are torts, has a threat to erect a building ever been regarded as one? Both he and Lord Finlay were on safer grounds when they said that the possible abuse of procedure by buying a licence to commit a tort could be prevented by the Court itself (pp. 860—861, 865).

(t) *Post*, §§ 97, 98, 110. (u) *Couch v. Steel* (1854), 3 E. & B. 402.

person who can show that he has sustained harm from its non-performance can bring an action for damages against the person on whom the duty is imposed (a); if this were the rule it might lead to unjust, not to say absurd, results in creating liabilities wider than the Legislature could possibly have intended.

§ 38.

✓ Where a Common Law right already 'in existence is extinguished by a statute, of course it disappears, but where the statute does not expressly or by necessary implication do this, there is no presumption that such is its effect (b). Indeed, it is quite possible that it may leave the old right existing side by side with the new one which it creates; thus, where an injury was caused to a workman by the personal negligence or wilful act of his employer, nothing in the Workmen's Compensation Act, 1925, affected the civil liability of the employer, and the workman might, at his option (c), proceed alternatively under the Act or at Common Law (d).

✓ If an entirely new duty is imposed upon some one and consequently a new right is conferred upon some one else, we must discover from the interpretation of the statute whether the remedy for breach of the duty is limited to what is expressly stated in the statute (e.g., a fine of £10 payable to the Crown) or whether there is also an action in tort available to one injured by the breach. Every statute must be interpreted on its own merits. Subject to that the following ancillary rules apply.

Primary
guide:
interpreta-
tion.

Sub-rules.

✓ First, prima facie a person who has been injured by a breach of the statute can sue unless it can be established by considering the whole of the Act that no such right was intended to be given (e).

(i) Prima
facie action
lies.

✓ Secondly, the general object of the statute must be con-

(ii) General
object of
statute.

(a) In *Atkinson v. Newcastle Waterworks Co.* (1877), 2 Ex. D. 441, the Court of Appeal's doubts as to this dictum of Lord Campbell's were so strong as to amount to disapproval of it. Whether *Couch v. Steel* itself would now be decided in the same way is a more open point. Defendant was bound under a penalty to keep a proper supply of medicines on his ship for the health of the crew. He did not do so. A seaman who fell ill in consequence was held entitled to sue the defendant for damages.

(b) Craies, *Statute Law* (4th ed. 1936), 213, 287; *Barnes v. Irwell Valley Water Board*, [1939] 1 K. B. 21; *Read v. Croydon Corporation* (1939), 108 L. J. K. B. 72.

(c) For the meaning of "option", see *Young v. Bristol Aeroplane Co., Ltd.*, [1946] A. C. 163.

(d) 15 & 16 Geo. 5, c. 84, s. 29. The Act was repealed by the National Insurance (Industrial Injuries) Act, 1946.

(e) Greer, L.J., in *Monk v. Warbey*, [1935] 1 K. B. 75, 81.

§ 38.

sidered. What kind of mischief was it intended to prevent? If it is exactly the type of harm which the plaintiff has suffered, that is a strong argument in favour of his right to sue. In *Monk v. Warbey* (f) A owned a car. By the Road Traffic Act, 1930, he was under a duty, breach of which was punishable by heavy penalties, to insure the car against the risk of its injuring other persons, not only when the car was in use by A, but also when any other person was using it by A's permission. In fact, his policy of insurance covered only A's own acts. He lent the car to B. C was driving it on B's behalf when the plaintiff was injured by C's negligence. Neither B nor C was insured against third party risks. The plaintiff sued A for personal injuries, B and C being destitute of means. One of A's defences was that the statutory duty was a public one only, but the Court of Appeal held that it was not thus limited and that the plaintiff could recover; for the Road Traffic Act was passed (*inter alia*) for the very purpose of making provision for third parties injured by the negligent driving of uninsured persons, and it would have been small consolation to the plaintiff to tell him that the defendant was punishable by a fine of £50 (g).

On the other hand, if the object of the statute was to prevent mischief of a particular kind, one who suffers from its non-observance loss of a different kind cannot twist its remedy into an action for his own recoupment. In *Gorris v. Scott* (h) the defendant, a shipowner, was under a statutory duty to provide pens for cattle on his ship in order to lessen the risk of murrain among them. The plaintiffs' sheep were swept overboard in consequence of lack of such pens. The defendant was held not liable, because it was no part of the purpose of the statute to protect cattle against the perils of the sea. This decision may easily be misunderstood unless it is realised that the plaintiffs made no claim whatever apart from the statute. If, quite apart from his statutory duty, the defendant had been negligent so that the sheep would have been washed overboard, pens or no pens, then the plaintiffs could have recovered either for breach of contract or for the

(f) [1935] 1 K. B. 75 (W. Case, 69).

(g) Where the lack of insurance has no connexion with the injury suffered, *Monk v. Warbey* does not apply: *Daniels v. Vaux*, [1938] 2 K. B. 203; nor where there is no liability under the Act of 1930: *Goodbarne v. Buck*, [1940] 1 K. B. 771.

(h) (1874), L. R. 9 Ex. 125.

tort of negligence. As it was, they relied on the statutory obligation and on nothing else.

§ 38.

Even where the loss is of a kind contemplated by the Act, the plaintiff may be unable to recover because the language of it shows that no greater liability is to be incurred than that contained in the penalty. In *Atkinson v. Newcastle Water-works Co.* (i), Parliament had required the defendant company, who supplied Newcastle with water, to maintain a certain pressure of water in their pipes and had fixed a £10 penalty for failure to do so. The plaintiff's house was burned down in consequence of such a failure. But the company was held not liable to him in an action for damages, for it was most improbable that the Legislature ever intended the company to undertake, in addition to the risk of the £10 penalty, the heavy liability of becoming gratuitous insurers against fire of all the buildings in Newcastle.

Thirdly, the plaintiff must show that the Legislature intended that the duty should be owed to him as well as to the State, and not that it should be owed merely to the State, i.e., if it was solely a public duty, the plaintiff cannot recover for breach of it. It was thought in some quarters that if the plaintiff could show that he was one of a special class of the community for whose benefit the Act was passed, then the Act must have given him a right of action; but it is now clear that this is not a conclusive test, for even if he is one of such a class the duty may still be a public one and nothing more. Thus a statutory duty to keep a motor-car in a condition not likely to cause danger to any person on the car or on any highway is a public duty only, and a person injured by non-compliance with it has no remedy under the statute, though it is quite possible that he can sue at Common Law. McCardie, J., in *Phillips v. Britannia Hygienic Laundry Co.* (j), thought the duty was public, because it was for the benefit of the public generally (all users of the highway); but Atkin, L.J., in the Court of Appeal (k), preferred to affirm the decision on the broader ground that the Legislature could not have intended to create new duties toward individuals who are already sufficiently protected by the Common Law remedies in tort against negligence on the highway (l).

(iii) Duty must be to plaintiff.

(i) (1877), 2 Ex. D. 441.

(j) [1923] 1 K. B. 539

(k) [1923] 2 K. B. 832, 841-842.

(l) Approved by Court of Appeal in *Monk v. Warbey*, [1935] 1 K. B. 75.

§§ 38, 39.

(iv) Nature of penalty.

Fourthly, the nature of the penalty must be considered. It is improbable that, if a trivial fine is fixed for breach of the statutory duty, that will deprive a person injured by neglect of it of a well-recognised Common Law right. A forty-shilling fine to which a railway company is by statute liable for not keeping its gates closed at a level-crossing will not exclude a person who is run over by a train from suing the company in tort (*m*). Even if the penalty is substantial and a portion of it may be (but is not necessarily) paid to the injured party, that will not as a matter of course deprive him of his right of action. Thus in *Groves v. Wimborne* (*n*) the statute made any occupier of a factory, who did not properly fence dangerous machinery, liable to a fine of £100; and it provided that the whole or any part of the fine might be applied, if the Secretary of State should so determine, for the benefit of the person injured by the occupier's neglect. A boy employed in the factory of the defendant was caught by an unfenced cog-wheel and his arm had to be amputated. The Court of Appeal held that he was entitled to recover £150. It was true that the whole or part of the fine fixed by the Act might be applied for his benefit, and that it was therefore arguable that he had no remedy outside the statute. But to this it was answered that there was no *certainty* that any part of the fine would be awarded to him, and, even if it were awarded, its upward limit of £100 made it incredible that Parliament would have regarded that as a sufficient and exclusive compensation for mutilation or death (*o*).

Tort and felony.

✓ § 39. The rule that "trespass is merged in a felony".

Where the same facts constitute a tort and a felony, no action for damages can be brought by the plaintiff against the defendant so long as the defendant has not been prosecuted, or a reasonable cause has not been shown for his not having been prosecuted; and the Court, where such an action is brought, ought to stay further proceedings until these conditions are satisfied (*p*).

History.

A more compendious but less intelligible way of stating

82, 85. See, too, *Square v. Model Farm, etc., Ltd.*, [1939] 2 K. B. 365; *Clarke v. Brims*, [1917] K. B. 497, 505.

(*m*) *Browne and Theobald*, *Railway Companies* (4th ed. 1911), 282-283. (*n*) [1898] 2 Q. B. 402.

(*o*) Other examples are *Dormont v. Furness Ry.* (1883), 11 Q. B. D. 496; *Ross v. Ruge-Price* (1876), 1 Ex. D. 269.

(*p*) *Smith v. Selwyn*, [1914] 3 K. B. 98 (W. Cases, 72).

the rule is to say that "the trespass (q) is merged in the felony". The earliest express statement of the rule is traced by Sir William Holdsworth (r) to Higgins v. Butcher, decided in 1607 (s). X beat Y's wife so that she died next day. Y sued X, but what he was suing for does not clearly appear. It may have been for the injury which his wife had sustained or it may have been for the loss of her *consortium* which he had suffered; more probably it was the first (t). The Court held that the declaration was not good "because it was brought by the plaintiff for beating his wife : and that being a personal tort to the wife, is now dead with the wife : and if the wife had been alive, he could not without his wife have this action ; for damages shall be given to the wife for the tort offered to the body of his wife". If the action were on behalf of the wife, and not for the loss of her *consortium*, the decision was sensible enough (u). So far not a word was said about trespass being merged in a felony. But then the Court went on to deal with a case not before it and one which, so far as I know, had never previously been litigated. They said : "If a man beats the servant of J. S. so that he dies of that battery, the master shall not have an action against the other, for the battery and loss of the service, because the servant dying of the extremity of the battery, it is now become an offence to the Crown, being converted into felony, and that drowns the particular offence and private wrong offered to the master before, and his action is thereby lost." No good reason, however, is stated why the action should perish altogether instead of being merely suspended, nor, apart from two doubtful earlier decisions, do I know of any case before Higgins v. Butcher in which it was actually held otherwise,

(q) "Trespass", it will be recollected, signifies in its widest sense any direct and immediate injury to the person or to property.

(r) H. E. L., iii, 331—333.

(s) Yelv. 89.

(t) Yelv. 89, and 1 Brownlow 205, refer to "his damage". Noy 18, is inconclusive. 2 Rolle Abr. 568 favours the first view. So, I think, does the language of the judgments in Yelverton and Brownlow (*supra*). Moreover, if the action were for the husband's loss of his wife's *consortium*, the decision that the wife must be joined was in conflict with the authorities cited in Guy v. Livesey (1617), Cro. Jac. 301. Again, if Higgins v. Butcher decided that his action for loss of *consortium* died with the wife, it was perhaps inconsistent with older law: Y. B. Mich. 43 Edw. 3, f. 23, pl. 16; 44 Lib. Ass. pl. 13. It was settled after Higgins v. Butcher that the action perished with her death: Baker v. Bolton (1809), 1 Camp. 493.

(u) Cf. Hyde v. Scysson (1618), Cro. Jac. 538.

§ 39.

(though some queer arguments were urged for exempting the felon from a civil action (a).

I think that the *obiter dictum* about the servant in *Higgins v. Butcher* was bad law propped up by two bad reasons (b); that it is no authority for the proposition that an action in tort against a felon is extinguished (instead of being merely suspended); and that on this point it is a solecism in the history of our law, for there is very scanty later authority in its support (c) and many decisions are against it (d).

(a) Thus it was said in *Y. B. Hil. 6 Hen. 4, f. 6, pl. 29*, that after he had been attainted (i.e., convicted) he had died in law and if he were pardoned he became a new man, but the Court declined to accept this theory of the resurrection of the unjust. Again, it was urged unsuccessfully in *Banyster v. Trussel* (1596), *Cro. Eliz.* 516, that the attainted felon was like the monk or the married woman, for as the monk's body belonged to religion and the married woman's to her husband, so the felon's belonged to the Crown.

Sir William Holdsworth (*H. E. L.* iii, 331-333) was of opinion that at first any question about suspension of a civil remedy against the felon must have been purely academic, for, as a felon's property was always forfeited, there was no point in suing him; that the question became more practical when statutes of 1566 and 1576 made it possible for a felon who had received benefit of clergy to recover his property; and that the view then taken was that the civil action perished: for in old times if you indicted a man, you could never afterwards "appeal" him of felony, except for murder, and when the action of trespass took the place of "appeal of felony", the same limitation stuck to it.

But I venture to suggest that the question of suspension of the civil remedy was never purely academic, for a felon did not forfeit his property until he was convicted; and even if he were convicted his conviction might be upset by purgation or by pardon. Moreover, except for the two doubtful decisions of 1462 and 1591 to which I have referred (*Y. B. Pasch. 2 Edw. 4, f. 1, pl. 12*; *Trussel's Case*, *Cro. Eliz.* 213, in which latter case, the K. B. admitted that their decision was against judgments of the C. P. and Exch.; and in *Banyster v. Trussel*, *supra*, they changed their minds), I believe that the law from Edward I's time down to *Higgins v. Butcher* was that, unless death resulted, the action in tort was never lost but was merely suspended. It is clear that if the felon got pardon or purgation he could be sued by the injured party. The only real doubt in the Year Book period (c. 1290-1535) was whether the remedy was suspended if he did not get pardon or purgation. See, in addition to authorities already cited, Britton (ed. Nichols), ii, 345; *Y. B. Hil. 6 Hen. 4, f. 7, pl. 31*; *Verney's Case* (1455), *Dyer* 245 b; *Y. B. Mich. 6 Edw. 4, f. 4, pl. 11* (after a full dress debate, the Exch. Chamber awarded that X, who had been outlawed for felony and had been pardoned, should remain in prison until he should have satisfied the injured party).

(b) The Court held that the master could not sue for loss of the servant's services, first, because of the Common Law rule that an action in tort dies with the plaintiff or defendant (but here it was not the plaintiff or the defendant who had died); secondly, because a trespass is merged in a felony (but it is merged only in the sense that it is suspended).

(c) *Markham v. Cobb* (1626), *W. Jones* 147, is inconclusive. Buller, J., *obiter*, in *Master v. Miller* (1791), 4 T. R. 320, 332-333, and Lord Eldon, L.C., in *Cox v. Paxton* (1810), 17 Ves. Jun. 329, 331.

(d) Examples are: *Dawkes v. Coreneigh* (1652), *Style* 346; *Horwood v. Smith* (1788), 2 T. R. 750 (unphed); *Crosby v. Long* (1810) 12 East 409;

In the nineteenth century there was some doubt whether the rule even as to suspension of the action had much validity, but much more serious doubt arose as to how the rule was to be enforced. It was suggested in *Wells v. Abrahams* (e) and decided in *Smith v. Selwyn* (f) that the proper course for the Court to adopt is to stay the action (g). In that case a man sued for injuries to his wife which constituted not only a tort but also a felonious administration of a drug to her.

§ 39.

Present law:
remedy
suspended.

The basis of the rule at the present day is public policy which requires offenders to be brought to justice. Its limitation to felonies—for it does not apply to misdemeanours—is due to its historical origin, and is justifiable nowadays on the workable though somewhat inaccurate idea that felonies are graver offences than misdemeanours.

The rule does not apply (i.e., there is no suspension of the action) if the felon has been prosecuted (h) nor if prosecution is impossible, e.g., by death, nor (but this is doubtful) if he has escaped (i). Further, if the felony was not committed against the plaintiff he can sue, for he is under no duty to prosecute. In *Appleby v. Franklin* (j) the plaintiff sued for the loss of her daughter's services by reason of the defendant's seduction of her. It was held to be no objection to the action that the defendant was alleged to have committed the felony of administering drugs to the daughter with intent to procure abortion. And in *Smith v. Selwyn* (supra), if the husband's claim for the loss of his wife's consortium had not been inextricably mixed up with a claim by the wife herself, he would probably have found the felony committed upon her no bar to his action (k). On similar principles the trustee in bankruptcy of the injured party can sue without the necessity of a prosecution; for he represents, not the injured party, but his creditors (l).

Exceptions
to rule.

Gimson v. Woodfull (1825), 2 C. & P. 41; *Marsh v. Keating* (1834), 1 Bing. N. C. 198; and all the later 19th century cases. See, too, Coke, 3 Inst. 215; 1 Hale, Pleas of the Crown (1st ed. 1736), 516.

(e) (1872), L. R. 7 Q. B. 554 (f) [1914] 3 K. B. 98 (W. Cases, 72).

(g) In *Smith v. Selwyn*, the claim for staying the action was made by summons, but the order for staying the action may well be made by the Court *proprio motu*, if the facts before it show a felony. Cf. Salmond, Torts, 178, note (g).

(h) *Stone v. Marsh* (1827), 6 B. & C. 551, 564–566.

(i) *Ex p. Ball* (1879), 10 Ch. D. 667, 674, 675, where the dicta of Baggallay, L.J., and Bramwell, L.J., are in conflict.

(j) (1886), 17 Q. B. D. 93. See, too, *Mattouk v. Massad*, [1943] A. C. 588.

(k) [1914] 3 K. B., at p. 104.

(l) *Ex p. Ball* (1879), 10 Ch. D. 667.

§ 39.

Conversely, if it is not the felon himself who is being sued but some third person who has innocently acquired the plaintiff's property from the felon, the rule does not apply (*m*).

The Fatal Accidents Act, 1846, expressly excludes application of the rule to an action brought under that Act. It is maintainable even if the death in respect of which it is sued was caused by conduct amounting to a felony (*n*).

(*m*) *Marsh v. Keating* (1834), 1 Bng. N. C. 198, 217—218; *White v Spettigue* (1845), 13 M. & W. 603.

(*n*) 9 & 10 Vict. c. 93, s. 1. *Post*, § 57.

CHAPTER V

JOINT TORTFEASORS

§ 40. "Persons are said to be joint tortfeasors when their respective shares in the commission of the tort are done in furtherance of a common design . . . but mere similarity of design on the part of independent actors, causing independent damage is not enough; there must be concerted action to a common end." §§ 40, 41.
Definition.

✓ This definition was regarded by the Court of Appeal in *The Koursk* (a) as sufficiently accurate for practical purposes. It must be added that such a design may be imputed to human beings through the acts of animals in their charge. If my dogs and yours jointly worry X's sheep, we are unquestionably joint tortfeasors (b), even though we know nothing of what they are doing and the design is entirely that of the dogs; neither of us experiences any mental process at all in the matter. It should also be noted that so long as the design is common to two or more persons, it is enough that what is done is in furtherance of it even if the person who in fact does it acts without the assent, or even against the commands, of his coadjutors. Thus, I am liable for the torts of my servant committed in the course of his employment, and generally I alone am sued because I alone am worth suing, but of course he is in general personally liable and he can be sued separately; or, as the law regards us as joint tortfeasors, we can be sued jointly. It is no excuse for me that I may have forbidden him to do the act (c); so long as he does it in the course of his employment we are joint tortfeasors, for he is acting in furtherance of a common design,—the business with which I have entrusted him. ✓

✓ § 41. The commonest classes of joint tortfeasors are principal and agent (including master and servant) and partners. Master and servant have already been considered and, as was then noted, the law as to principal and agent in general Kinds of
joint tort-
feasors.

(a) [1924] P. 140, 151—152, 156, 159.

(b) *Arnel v. Paterson*, [1931] A. C. 560.

(c) *Ante*, p. 126.

§§ 41—42.

and as to partners in particular is accessible in monographs on those topics. Here it is enough to say that the liability of the principal for the tort of his agent is (except for the doctrine of common employment) in effect the same as that of the master for his servant (*d*); and that by the Partnership Act, 1890 (*e*), partners are made liable for the wrongful act or omission of any partner acting in the ordinary course of business, or with the authority of his co-partners, which causes loss or injury to any person not a member of the firm. Another example (now extinct) of joint liability—that of husband and wife for the wife's torts (*f*)—can be treated only as a historical accident; while it existed it could be squared with no known description of joint liability (*g*). These classes of tortfeasors are not, of course, exhaustive; many instances of joint tortfeasors occur which fall outside them.

Common
design.

~ § 42. Not unnaturally there has been some litigation on the dividing line between the community of design which will create joint liability and mere similarity of design which will not. In *The Kursk* (*h*), by independent acts of negligence on the part of each vessel, the *Kursk* and the *Clan Chisholm* collided with one another. As a direct consequence of that collision and without any intervening negligence, the *Clan Chisholm* ran into and sank the *Itria*. The owners of the *Itria* recovered damages against the *Clan Chisholm*, the owners of which limited their liability, and the owners of the *Itria* then sued the owners of the *Kursk*. Held, the causes of action were distinct, that the *Kursk* and the *Clan Chisholm* were not joint tortfeasors, and that judgment against the *Clan Chisholm* did not bar the action against the *Kursk*. They had no more community of design than A and B would have if in consequence of separate slanders by them of C, C were dismissed by his employer, D.

(*d*) Bowstead, Agency (10th ed. 1944), 205—218.

(*e*) 53 & 54 Vict. c. 39, s. 10.

(*f*) *Ante*, p. 103.

(*g*) The liability of a parent or custodian of a child for personal negligence which enables his son to commit a tort is not, I think, an instance of joint liability. The son to whom a gun is given by his father may well be liable himself for putting out some one's eye with it; the father, however, may also be liable, not for that act, but for an independent tort of his own—personal negligence which made the son's tort possible. See *Bebee v. Sales* (1916), 32 T. L. R. 413. Cf. *Wray v. Essex G. C.* (1936), 155 L. T. 494.

(*h*) [1924] P. 140.

So too in *Sadler v. G. W. Ry.* (i), the G. W. Ry. occupied a railway parcels office at 269 Strand. The Midland Ry. had a similar office at No. 267, and the plaintiff carried on business as an athletic outfitter at No. 268 between the two railway companies. Access to the shop was obstructed by the vans of each company on each side of the shop. The plaintiff joined both companies as defendants in an action for damages and for an injunction. It was held that the defendants were not joint tortfeasors and the action was dismissed, although the point was left open whether a claim for an injunction only would have been successful; for a nuisance which consists of several independent acts of several independent people can be remedied by an action for an injunction against each (k); and these actions may be tried together (l), but whether they can be joined as separate tortfeasors in the same action was a question which the Court declined to decide in *Sadler v. G. W. Ry.*, as there was an inextricable confusion in the pleading in that case.

Another example of independent torts would be harm sustained by a patient from the incompetent surgery of A succeeded at a later date by the incompetent surgery of B (m).

On the other side of the line an instance of concerted action is *Brooke v. Bool* (n), where X procured Y's assistance in searching for a gas leak on Z's premises, and in succession each of them applied a naked light to a gas pipe and Y's application caused an explosion. Here X and Y were joint tortfeasors (o).

It has been ruled that members of a hunt do not become joint trespassers with one another if they go upon land without the assent of the owner. No reason was given for this ruling (p), and it seems contrary to principle, in so far as it relates to intrusions on the land which are undertaken in concert and which all have the same purpose. Another ruling equally destitute of any reason seems to go too far the other way,—that a member of a hunt is a joint tortfeasor with any

(i) [1896] A. C. 450.

(k) *Thorpe v. Brumfit* (1873), L. R. 8 Ch. 650.

(l) *Lambton v. Mellish*, [1894] 3 Ch. 163.

(m) See, too, *Bulmer Rayon Co., Ltd. v. Freshwater*, [1933] A. C. 661. *Ash v. Hutchinson & Co.*, [1936] Ch. 489.

(n) [1928] 2 K. B. 578 (W. Cases, 265).

(o) See, too, *Aineil v. Paterson*, [1931] A. C. 560; *ante*, p. 165.

(p) *Paget v. Birkbeck* (1863), 3 F. & F. 683.

§§ 42, 43.

one of a concurrence of people who enter on the forbidden land with him (q).

Note that the coincidence of the acts or their separation in point of time has no necessary connexion with determining whether the tort is joint or several. It is quite possible for the wrongs to be several although they are contemporaneous, as in *The Koursk* (*supra*), where separate actions were maintainable (r); conversely the wrong may be a joint one although the acts are not simultaneous, as in *Brooke v. Bool*.

Action
against one
joint tort-
feasor.

§ 43. The injured party can sue each joint tortfeasor separately or all of them jointly, but until the Law Reform (Married Women and Tortfeasors) Act, 1935 (see end of this section), if he obtained judgment against one or more of them in an action, he could not afterwards sue the other or others. *Brinsmead v. Harrison* (s) was a strong illustration of this. Brinsmead sued Harrison in detinue for the recovery of a piano. Harrison's defence was that the wrong was the joint one of himself and T and that Brinsmead had already recovered judgment against T. Brinsmead replied that this judgment was wholly unsatisfied. It was held, nevertheless, that this was a sufficient bar to the action against Harrison. The reason put by Blackburn, J., was, "Interest reipublicae ut sit finis litium". Kelly, C.B., worked this out in detail by urging that if the rule were otherwise a sharp attorney might accumulate costs by suing joint defendants one at a time, and also that in a second action the second jury might assess an amount different from that in the first action and the plaintiff would not know for which sum he should levy execution. Whether the second action was barred where the plaintiff, at the date of suing the first, neither knew nor had reasonable means of knowing that more than one person was concerned in the tort is uncertain (t). The point is still of some

(q) *Hume v. Oldacre* (1816), 1 Stark. 351. Cf. Clerk & Lindsell, Torts, 100, note (p).

(r) An unusual case is a Virginian one in which a female passenger was negligently deposited at the wrong destination by X a carrier and was subsequently raped by Y while on her way to her destination. It was held that, provided the passenger left the train under compulsion, X was liable, not as a joint tortfeasor, but as the cause of the rape: *Hines v. Garrett* (1921), 131 Va. 125. Presumably in England the consequence would be too remote.

(s) (1872), 11 R. 7 C. P. 547.

(t) It is submitted that, unless judgment in the first action had been satisfied, the second action ought to have been allowed, for it certainly

importance, for the Act of 1935 gives the Court a discretion as to costs where successive actions are brought. §§ 43, 44.

Part II of the Law Reform (Married Women and Tortfeasors) Act, 1935 (*u*), has abolished the rule that judgment against one joint tortfeasor bars actions against the others. It came into operation on November 1, 1935 (*a*), and applied only to torts committed on or after that date (*b*). It puts a check on vexatious litigation by the injured party by providing that "if more than one action is brought in respect of that damage by or on behalf of the person by whom it was suffered, or for the benefit of the estate, or of the wife, husband, parent or child, of that person, against tortfeasors liable in respect of the damage (whether as joint tortfeasors or otherwise) the sums recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given (*c*); and in any of those actions, other than that in which judgment is first given, the plaintiff shall not be entitled to costs unless the Court is of opinion that there was reasonable ground for bringing the action" (*d*). Nothing in the Act is to affect any criminal proceedings against any person in respect of any wrongful act (*e*).

§ 44. In a judgment against joint tortfeasors the damages awarded must be for a single sum without any apportionment among the defendants (*f*), and execution for the whole of this

Contributio.
among joint
tortfeasors.

would not be vexatious litigation of the type deprecated in *Brinsmead v. Harrison*. Release of one joint tortfeasor has the same effect as judgment: *Duck v. Mayeu*, [1892] 2 Q. B. 511, because the cause of action is one and indivisible (*ibid.*, 513); but an agreement not to sue (as distinguished from a release, *post*, § 186) is limited to the tortfeasor to whom it is given: *Apley Estates, Ltd. v. De Bernaldes*, [1947] 1 Cb. 217. The ground for this rather puzzling distinction is that the rule as to release has often worked hardship and therefore ought not to be extended (Morton, L.J., *ibid.*, 221). Further, the rule as to an agreement not to sue seems to be unaffected by the Act of 1935 (Somervell, L.J., *ibid.*, 222).

(*u*) 25 & 26 Geo. 5, c. 30, s. 6 (1).

(*a*) S. 7 and [1935] W. N. 305.

(*b*) S. 6 (4) (*a*).

(*c*) "Judgment first given" shall, where that judgment is reversed on appeal, be construed to refer to the judgment first given which is not so reversed; and where a judgment is varied on appeal it shall be construed to refer to the judgment so varied: s. 6 (3) (*b*).

(*d*) S. 6 (1) (*b*).

(*e*) S. 6 (4) (*b*).

(*f*) *London Association for Protection of Trade v. Greenlands, Ltd.*, [1916] 2 A. C. 15, 32. If of two joint tortfeasors, A and B, A has behaved in such a way as to make him liable for exemplary damages if he alone were

§ 44.

Formerly
none.

amount can, if the plaintiff sees fit, be levied against one only of the defendants. Can this defendant recoup himself against the other defendants? Until the Act of 1935 (§ 43, *ante*) the general rule was that he could get neither an indemnity for the whole of what he had paid nor contribution of an aliquot part of it. This was laid down in *Merryweather v. Nixan* (g).

Exceptions :
(i) At
Common
Law.

Decisions later than *Merryweather v. Nixan* removed most of its crudity. It did not apply where the tort was not clearly illegal in itself (h) and the person who sought recompense from his joint tortfeasor acted in the belief that his conduct was lawful; nor, it is submitted, where even though the tort was clearly illegal in itself, one of the parties had been held vicariously liable for another's wrong to which he gave neither his authority nor assent and of which he had no knowledge. In *Adamson v. Jarvis* (i) the plaintiff, an auctioneer acting on the instructions of the defendant, who falsely told him that he (the defendant) was the owner of certain goods, sold the goods by auction and was subsequently compelled to make good their value to the true owner. It was held that the plaintiff could recoup himself against the defendant for the full amount. Best, C.J., said that the rule in *Merryweather v. Nixan* "is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act" (k). Moreover, the exception to the rule might hold good even where the joint enterprise proved to be a crime.

sued, while B is comparatively innocent morally, the jury must return only one set of damages if the plaintiff sues both A and B. But what rule of assessment must they apply? According to Alderson, B., in *Clark v. Newsam* (1847), 1 Ex. 131, 140, "the real injury is the aggregate of the injury received from both", and he seems to have regarded this as some sort of arithmetical mean between the innocence of A and the innocence of B: so, too, Bankes, J., in *Smith v. Streetfield*, [1913] 3 K. B. 764, 769 and Slesser, L.J., in *Chapman v. Ellesmere*, [1932] 2 K. B. 431, 471—473. Perhaps the plaintiff's best course is to sue A only.

(g) (1799), 8 T. R. 186: a decision of Lord Kenyon, C.J., which was much criticised later both in and out of the Courts (17 L. Q. R. (1901), 293—301), but mainly because the C.J. was regarded as having decided that there never can be contribution among joint tortfeasors, although he certainly did not go so far as that. In 1894, the House of Lords thought that it was too late to uproot the rule from English law, though they refused to force it upon Scots law, Lord Herschell, L.C., regarding it as destitute of any principle of justice, or equity, or even of public policy: *Palmer v. Wick, etc. Co., Ltd.*, [1894] A. C. 318, 321.

(h) Lord Denman in *Belts v. Gibbins* (1834), 2 Ad. & E. 57, 74; *Morham v. Grant*, [1900] 1 Q. B. 88, 93.

(i) (1827), 4 Bing. 66.

(k) 4 Bing. at p. 73.

In *Burrows v. Rhodes* (l), Burrows was induced to take part as a trooper in the famous "Jameson Raid" by false representations on Rhodes' part that protection against the Boers was needed for English women and children in Johannesburg. The raid into the Transvaal was repulsed by the Boers, and Burrows claimed from Rhodes £3,000 damages for the loss of his kit, pay, earnings and leg. It was held to be no objection to his claim that the raid itself was a criminal offence, for the lies told to Burrows made him believe that his act was moral and laudable; but had he known all the facts he could not have claimed indemnity even if he did not know that his act was a crime, for a man is presumed to know the law (m).

§ 44.

Even before the Act of 1935, there were two statutory exceptions to the rule in *Merryweather v. Nixan*. By the Maritime Conventions Act, 1911 (n), where loss of life or personal injuries occur on board a vessel owing to the fault of that vessel and any other vessel, and a proportion of the damages is recovered against the owners of one of the vessels which exceeds the proportion in which she was in fault, they may recover the amount of the excess from the owners of the other vessel. (ii) By statute.

The Companies Act, 1929, s. 37 (3) (o), provided that where a director of a company or one who had authorised the issue of the prospectus had become liable for false statements in the prospectus, he might recover contribution from any other person who, if sued separately, would have been liable to make the same payment. But this did not apply to the party who thus claimed contribution if he had been guilty of fraudulent misrepresentation and the other person was innocent. This part of the Act of 1929 was repealed by the Companies Act, 1947 (p), which substitutes for it the right to recover contribution which was introduced by the Law Reform (Married Women and Tortfeasors) Act, 1935 (*infra*).

The Law Reform (Married Women and Tortfeasors) Act, 1935 (q), Part II, s. 6, revises the Common Law rule by Act of 1935.

(l) [1899] 1 Q. B. 816.

(m) *Ibid.* 829-830.

(n) 1 & 2 Geo. 5, c. 57, s. 3.

(o) 19 & 20 Geo. 5, c. 23.

(p) 10 & 11 Geo. 6, c. 17, s. 65 (4).

(q) 25 & 26 Geo. 5, c. 30. Took effect Nov. 1, 1935, and does not apply to any tort committed before that date.

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allowing a tortfeasor to recover contribution from any other tortfeasor who is liable in respect of the same damage (r), whether as a joint tortfeasor or otherwise (s); but he cannot do so if that other tortfeasor were entitled to be indemnified by him. The following example will illustrate the exception. Where A and B, before they commit a tort, agree that A shall indemnify B in respect of any liability arising therefrom, and C the injured party recovers damages from A, A cannot recoup himself against B; for if the tort is not an obviously wrongful one, the agreement to indemnify B is a lawful agreement and the section accordingly prevents A from getting contribution from B.

Other cases which the Law Revision Committee had in mind in recommending the reform of this branch of the law (t) were the following: X by fraudulent misrepresentation induces A to do an unlawful act which A, in consequence of the misrepresentation, believes to be not unlawful. Here A is entitled to be indemnified by X (u) and X, if he has paid all the damages, can claim no contribution from A. So, too, if a servant or agent commits a tort in the course of his employment, his employer is vicariously responsible; but, unless the employer expressly authorised or connived at the commission of the tort, he is entitled to be indemnified by the servant or agent; and if the latter be sued alone and cast in damages, he cannot seek contribution from the employer. The Act provides that "the amount of the contribution recoverable from any person shall be such as may be found by the Court to be just and equitable having regard to the extent of that person's responsibility for the damage" (w). It seems reasonable to regard "responsibility" as referring to the moral accountability of a person, and, indeed, that is one of the

(r) The expeditious procedure under Rules of Supreme Court, Order XLIA (Third Party Procedure) applies and prevents circuity of action: *Daniel v. Rickett, etc.*, [1938] 2 K. B. 322. In a claim for contribution, it is probably unnecessary to plead the statute: *Burnham v. Boyer*, [1936] 2 A. E. R. 1165. For the application of the Limitation Act, 1939, see *Merlihan v. Pope, Ltd.*, [1946] K. B. 166; *Horden-Richmond, Ltd. v. Duncan*, [1947] K. B. 545.

(s) This meets the case of X and Y, two motor-car drivers, whose independent acts of negligence concur in injuring Z. X and Y are not joint tortfeasors (unless, of course, they are racing or otherwise acting in concert); but the Act gives them contribution against each other. Cf. *Croston v. Vaughan*, [1938] 1 K. B. 540.

(t) Third Interim Report, 1934, Cmd. 4637.

(u) *Burrows v. Rhodes*, [1899] 1 Q. B. 816; *ante*, p. 171.

(w) S. 6 (2).

meanings given in the English dictionary. This view is supported by the decision of Hallett, J., in *Weaver v. Commercial Process, Ltd.* (x), in which he declined to follow the decision of Hilbery, J., in *Collins v. Herts C.C.* (y), that "responsibility" signifies the extent to which the wrongdoers respectively caused the injury, and not their relative culpability for it. At any rate, the facts of the case may exempt the defendant from any liability to contribute, or may direct that the contribution recoverable shall amount to a complete indemnity (z).

Nothing in the section renders enforceable any agreement for indemnity which would not have been enforceable if the section had not been passed (a). This appears to refer to cases where the party seeking indemnity knew or may be presumed to know that he was committing an unlawful act. But, as Coleridge, J., said in *W. H. Smith & Son v. Clinton* (b),^k "where one person requests another to commit or where they jointly commit an indifferent act, of which the illegality does not appear, but which may subsequently be proved to be tortious, the contractual relation may arise; and where one party induces another party by fraud to commit a tortious act, and that other party does not in fact know and need not be presumed to know that he was doing an unlawful act, he may have redress or contribution". The facts of the case were that the defendants had contracted to indemnify the plaintiffs, a printing and publishing firm, against any claims made against them for libels appearing in the defendants' paper, *Vanity Fair*. This indemnity was held to be irrecoverable on the facts which showed that the plaintiffs well knew that the matter published was libellous. The Act of 1935 preserves the principle, but there is nothing in the above section to show that if the plaintiffs had been innocent in the sense described by Coleridge, J., they could not have recovered upon the indemnity clause (c).

(x) (1947) 204 L. T. J. 59.

(y) [1947] K. B. 598, 623—624.

(z) S. 6 (2); *Croston v. Vaughan*, [1938] 1 K. B. 540; *Ryan v. Fildes*, [1938] 3 A. E. R. 517; *Whitby v. Burt, Boulton & Hayward, Ltd.*, [1947] K. B. 918. As to revision by the C. A. of the apportionment made by a lower Court, see *Ingram v. United Automobile Service, Ltd.*, [1943] K. B. 612.

(a) S. 6 (4) (c).

(b) (1908), 99 L. T. 840, 841.

(c) I have pointed out elsewhere that *Clinton's Case* seems to have been misunderstood: 49 L. Q. R. (1933), 161—162.

§ 45.

Merryweather v Nizan a species of a wider rule.

§ 45. The rule in *Merryweather v. Nizan*, with the Common Law qualifications just stated, was a branch of a much wider rule that if an act, whether it be a civil wrong or a crime (*d*), is manifestly unlawful or the doer of the act knows it to be unlawful, he cannot maintain an action for contribution to, or indemnity against, his liability arising therefrom. This principle, which seems to be unaffected by the Act of 1935, may quite well apply where the tortfeasors are not joint. In *Weld-Blundell v. Stephens* (*e*), its application was much discussed. The facts may be thus epitomised. P published a libel on X in a letter written by P to P's confidential agent, Q. Q negligently communicated the libel to Y. Any privilege that P might have had in publishing it to Q was negatived by express malice on P's part. X recovered damages from P for the libel. P sought to recoup himself against Q. A majority of the Court of Appeal held that P could recover only nominal damages for Q's breach of his duty to keep secret the contents of P's letter and that any further damages were in the nature of an indemnity for the consequences of P's own wilful wrong and were therefore irrecoverable within the principle stated above (*f*). The House of Lords by a majority affirmed this decision, but on a ground which was never argued in the Court of Appeal—remoteness of consequence; the decisive cause of the damage (beyond nominal damages) was P's own act. But four of the noble and learned lords also examined the ground on which the Court below had based its decision. Two of them held that the principle applied. Two of them held that it did not and that, so far as this side of the case went, P ought to be able to recover the whole of his damage from Q. Of these latter two, Lord Finlay thought that the principle was never meant to afford immunity to breach of trust by a confidential agent, and Lord Parmoor

(*d*) In the extraordinary case of *Everet v. Williams* (1725), 9 L. Q. R. (1893), 197—199, the plaintiff and defendant were in partnership as highway robbers and "dealt with several gentlemen for divers watches, rings, swords, canes, hats, cloaks, horses, bridles, saddles and other things" at Bagshot, Salisbury, Hampstead and elsewhere. The partnership realised some £2,000. The plaintiff brought a partnership action for an account of this sum. His claim was dismissed as scandalous and impertinent, his solicitors were fined £50 each for contempt, and at later dates both plaintiff and defendant were hanged.

(*e*) [1920] A. C. 956, 966—971, 976—978, 982, 984—986, 998.

(*f*) [1919] 1 K. B. 520.

considered that P's act was not manifestly unlawful, for his original communication of the letter to Q was privileged. Note that in any event *Weld-Blundell's Case* had nothing to do with joint tortfeasors. When P published the libel to Q, P alone had committed a tort; when Q published it to Y, he was not acting in concert with P who had never authorised the communication (g).

§ 45.

(g) In the United States there has been some litigation on questions arising from the following situation. A commits a tort against X. B, by a subsequent independent tort, aggravates X's injury. X recovers damages against either A or B. The typical example is where A and B, who are medical men, respectively cause and aggravate an injury to X by their incompetent treatment of his illness. If X recovers judgment against A, does that extinguish B's liability? Or *vice versa*? Can A recoup himself against B? Or *vice versa*? See 29 Columbia Law Review (1929), 630-637. Cf. Salmond, Torts, p. 75, note (c).

CHAPTER VI

LOCALITY OF TORT (a)

§§ 46, 47.

Meaning of
"foreign"
country.

§ 46. The question for discussion in this chapter is in what circumstances a tort committed in a foreign country is actionable here. We must begin by settling what "foreign" country means. For this purpose it signifies any country, whether it be a British dominion or not, which is outside England and Wales; and England and Wales include any islands which form part of, or are adjacent to, English or Welsh counties: *e.g.*, the Isle of Wight, Anglesey, Lundy Island. Moreover, the better opinion is that the maritime belt extending to a marine league from low-water mark outwards must also be reckoned as territorial. For the sake of brevity we can refer to this non-foreign territory as "England" or "here".

Need defend-
ant be in
England?

§ 47. Next we must consider whether the defendant must be in England in order to sue him. If he is out of England, it is possible to commence an action against him here, provided leave of the High Court be obtained to issue and serve the writ on him abroad. If the action be in tort, such leave will be given only if the whole subject-matter of the action is land situate in England, or if he is ordinarily domiciled or resident here, or if he has committed a tort here, or if an injunction is sought against him as to any nuisance within jurisdiction, or if he is a necessary or proper party to an action brought against some other person here (b). Hence, if he has committed a tort *in a foreign country* and remains out of England, the action cannot even be begun here unless he falls within this last mentioned alternative or unless he is domiciled here (for it is possible to be domiciled in a country even if one is not at the moment resident there).

(a) See, generally, Cheshire, *Private International Law* (3rd ed. 1917) Chap. XI; Dicey, *Conflict of Laws* (5th ed. 1932), Chap. XXVIII; Westlake, *Private International Law* (7th ed. 1925), Chap. XI; Foote, *Private International Law* (5th ed. 1925), Chap. IX; Pollock, *Torts*, 162—166; Salmond, *Torts*, § 42; Clerk & Lindsell, *Torts*, Chap. IV; Professor E. G. Lorenzen in 47 *Law Quarterly Review* (1931), 483—501.

(b) *Annual Practice: Rules of Supreme Court*, Ord. 11, r. 1. Dicey, *op. cit.*, Chap. V, is the best commentary on this rule. See, too, Cheshire, *op. cit.*, 150—158; Odgers, *Pleading* (13th ed. 1946), 30—34.

Assuming that the defendant is in England, or that, if he is abroad, he falls within one of the exceptions in the preceding paragraph, he can be sued, whatever be his nationality or that of the plaintiff, provided that his conduct (i) was not justifiable according to the law of the foreign country where it occurred, and (ii) was also tortious according to English law (c). Note that condition (i) is satisfied if the conduct is "not justifiable" according to foreign law; it is not necessary that it should be tortious in our sense of the word. It is enough if the foreign law regards it as criminal though not as tortious. In *Machado v. Fontes* (d), the plaintiff sued the defendant for a libel alleged to have been published on him in Brazil, and it was held to be no defence to the action that in Brazil libel is a crime but not a civil injury.

§§ 47, 48.
Rule stated.

The general rule may be amplified by the three following propositions.

§ 48. (1) If the defendant's conduct is not justifiable by foreign law but is not tortious here, no action for tort lies against him in an English Court.

(1) Act wrongful abroad but innocent here.

Various reasons are given for this rule. One is that if I commit an act which is illegal in, say, France but innocent here, it would be too much of a shock to our notions of justice and public expediency to allow an action here (e). Another is that it would be inconsistent with the moral rules upheld by English law to allow a remedy in damages for conduct which English law holds innocent (f), or (what seems to be the same thing) it would be carrying respect for foreign law too far (g). *The Halley* (h) is the example commonly cited for the rule. The *Halley*, a British vessel, while under the navigation of a Belgian pilot in Belgian waters, collided, owing to the pilot's negligence, with a Norwegian barque. The owner of the barque claimed damages in England against the *Halley*. According to Belgian law, the *Halley* was compelled

(c) Dicey, *op. cit.*, rules 188, 189. The law on this point differs in the various Continental systems: Westlake, *op. cit.*, 282. American law, upon the whole, is contrary to the English rule: Dicey, *op. cit.*, 770. The English rule is criticised by Professor E. G. Lorenzen in 47 *Law Quarterly Review* (1931), 500—501. Cf. Cheshire, *op. cit.*, Chap. XI.

(d) [1897] 2 Q. B. 231. Cheshire, *op. cit.*, 377—379, adversely criticises the decision.

(e) Westlake, *op. cit.*, 282.

(f) Dicey, *op. cit.*, 29; cf. 775.

(g) Pollock, *Torts*, 162.

(h) (1868), L. R. 2 P. C. 193.

§§ 48, 49.

to accept the services of the pilot and was not exempted from liability for his negligence. According to English law as it then stood, there was no liability for the negligence of a compulsory pilot (i). Hence the injury was not justifiable according to Belgian law, but was not tortious according to English law. The Court therefore held that the *Halley* was not liable.

(2) Act
wrongful
here but
innocent
abroad.

§ 49. (2) If the defendant's conduct is justifiable by foreign law but is tortious according to English law, no action for tort lies against him in an English Court.

Here again the rule is supported by a variety of reasons. Lord Mansfield's was that "whatever is a justification in the place where the thing is done, ought to be a justification where the cause is tried" (k), but this savours of a mere repetition of the rule. Another suggestion is that the act really disturbs social order in the foreign country and not here (l). A more tangible basis was supplied by Cockburn, L.C.J., in *Phillips v. Eyre* (m). He said that the act complained of might not only be lawful but might even be enjoined by the law of the foreign country, and it would be in the highest degree unjust that an individual who has intended to obey the law binding upon him should be liable in damages in another country where a different law may prevail. That would be altogether contrary to the comity of nations. This reasoning is sound enough so far as it goes, though it will not cover the case—admittedly an exceptional one in modern times—of a foreign country which is so backward as to allow no remedy for what would be an actionable wrong according to the law of any passably civilised State, e.g., a violent and unprovoked assault and battery; and, though the point is unsettled, it may be that an action would be permitted in England in such circumstances (n).

(i) Now by the Pilotage Act, 1913 (2 & 3 Geo. 5, c. 31), s. 15, the owner or master of a vessel is made liable for damage or loss caused by compulsory pilotage.

(k) *Mostyn v. Fabrigas* (1774), Cowp. 161, 175

(l) Westlake, *op. cit.*, 282.

(m) (1869), L. R. 4 Q. B. 225, 239. The decision was affirmed by the Exch. Chamber, L. R. 6 Q. B. 1, where other examples were cited by Willes, J., at pp. 28—30.

(n) *Per Wightman and Willes, JJ.*, in *Scott v. Seymour* (1862), 1 H. & C. 219, 235, 236—237. In *Szalatnay-Stacho v. Fink*, [1947] 1 K. B. 1, the alleged tort was not committed abroad.

In *Phillips v. Eyre* (o). Eyre was Governor of Jamaica and, in putting down a rebellion there, inflicted what the plaintiff alleged to be assault and false imprisonment upon him. After Eyre had committed these acts, but before the plaintiff commenced his action in England, the Legislature of Jamaica passed an Act indemnifying Eyre against any legal proceeding in Jamaica for what he had done in suppressing the rebellion, and this was held to be a good answer to the action in England.

§§ 49, 50.

§ 50. (3) If the defendant's conduct is not justifiable by foreign law and is tortious according to English law, an action in tort is maintainable here.

(3) Act wrongful both here and abroad.

An exception to this occurs where trespass is committed to foreign land (p). In *British South Africa Co. v. Companhia de Moçambique* (q), the plaintiff company sued the defendants in England for trespass to their mines in South Africa and the House of Lords held that the action was not maintainable. A technical reason for their decision was that the action for trespass to land was "local" and not "transitory", but it need not be pursued farther here (r). The substantial reason was the probable inconvenience which might arise if such an action were allowed; for the plaintiff, after recovering damages in England for the defendant's trespass in expelling him from his lands situated abroad, might leave England and repossess himself of the very lands for which he had already recovered damages, and in a backward country the defendant might have no remedy for this (s). Yet another reason is that the Court here would have no means of seeing that its judgment should be carried out abroad (t).

But it must not be hastily inferred from this that an action relating to foreign land can never be brought in England. If the defendant is here and is subject to some *personal obligation*

(o) The case was one of the results of fierce differences of political feeling in England as to the mode in which the rebellion in Jamaica was quelled: Justin McCarthy, *History of Our Own Times* (1905), II, 356-375.

(p) Including, *semble*, things attached to the land; e.g., a pier in a port: *The M. Morham* (1876), 1 P. D. 107, 109, 112; *British South Africa Co. v. Companhia de Moçambique*, [1893] A. C. 602, 622.

(q) [1893] A. C. 602.

(r) It is developed by Lord Herschell, L.C., at pp. 618 *et seq.*

(s) *Ibid.* 625-626.

(t) Pollock, *Torts*, 164. A curious case in Edward I's reign was that of an Italian merchant who was held not entitled to recover damages in England for ejection from his house in Florence by the victorious Guelphs. "It is not the custom of England that any one should answer in England for a trespass committed in a foreign country in time of war or in any other manner": Pollock & Maitland, *Hist. of Eng. Law*, I, 465.

§ 80.

arising out of contract, fiduciary relation, or fraud, or other conduct which an English Court of Equity would consider unconscionable, then the Court will entertain the action (u), and if the equitable right is such that the plaintiff could have enforced it against the defendant if the property had been here, it is immaterial that the property is not within the reach of the Court. In *Penn v. Baltimore* (a), Penn was owner of Pennsylvania and Lord Baltimore was owner of Maryland. Disputes between them arose as to the boundaries of the two provinces, and they entered into an agreement which purported to settle them. It was held that Lord Baltimore (who was in England) could be sued here for specific performance of the agreement (b). Incidentally, then, an English Court may have to investigate the title to foreign land, but if the question is *merely* one of title to foreign land, a Court of Equity will no more entertain an action than will a Common Law Court (c).

The rule laid down in *British South Africa Co. v. Companhia de Moçambique* (ante) has no application to an Admiralty action *in rem* against the owner of a ship which, by negligent navigation, has damaged a wharf attached to the soil of foreign territory. An "action *in rem*" of this kind is based upon the general rule of maritime law that a person whose property is injured by negligent navigation of a ship has a lien upon the ship; i.e., the ship can be arrested and sold in order to satisfy damages if they are not paid by the owner (d).

Torts on
ships.

If an act is done aboard ship on the high seas, the law of the country whose flag the ship is flying solely determines whether the act is tortious or not (e). This is easy enough to apply to acts which are confined to the ship itself, but what if they are external to the ship, e.g., disputes between two whaling vessels as to the capture of a whale, or between divers of different ships who are trying to salvage a wreck? Probably the principle still holds that no action will lie in

(u) *Deschamps v. Parker*, [1908] 1 Ch. 856.

(a) (1750), 1 Ves. Sen. 444.

(b) Note, however, that the decree was very narrowly limited, in order to avoid the possibility of making it a mere *brutum fulmen*: 1 Ves. Sen., at p. 455, and Supplement, 194.

(c) *Re Hawthorne* (1883), 23 Ch. D. 743.

(d) *The Tollen*, [1946] P. 135.

(e) *Cheshire*, op. cit., 391, considers that if the ship is a *foreign* one, then the plaintiff must prove not only that the defendant's act was not justifiable by the law of the flag, but also that it would have been actionable if occurring in England.

England unless the act is both tortious according to English law and not justifiable according to the law of the country whose flag the ship flies (*f*). But collisions between ships at sea are subject to exceptional rules. Even apart from statute and treaty, it seems that litigation in an English Court as to such collisions is governed entirely by English law (*g*). It matters nothing that one or both of the ships are foreign, or that according to foreign law the act is not a tort, for the jurisdiction is based on the fact that "the high seas . . . are subject to the jurisdiction of all countries" (*h*), and once get the parties before the Court, that is enough to make the English maritime law applicable. Such is the law apart from statutes and conventions; for these, reference must be made to the treatises on merchant shipping (*i*).

§§ 50, 51.

§ 51. The law of tort in relation to aircraft has still got some gaps in it and the following rules suggested by Professor Sir Arnold McNair are, as the learned author admits, largely conjectural (*j*).

Torts on aircraft.

(i) *Torts over Great Britain or Northern Ireland*.—A tort committed by a person in *any* aircraft when in the air over these territories or their adjacent territorial waters is cognisable as a tort committed on the subjacent land or water. Infringement of patents is, however, specially provided for by the Air Navigation Act, 1920 (10 & 11 Geo. 5, c. 80), s. 13 (*k*).

(ii) *Torts on or over the high seas*.—These are cognisable in the jurisdiction of any country which can render the tort-feasor amenable to its jurisdiction by the service of a writ or notice of a writ. The law applicable in England is either the Common Law or, if the tort falls within the scope of the maritime law, then the maritime law. The foundation of the jurisdiction is the principle cited in the preceding section with respect to collisions of ships on the high seas. The high seas are subject to the jurisdiction of all countries, they are not no man's land.

(*f*) Dicey, *op. cit.*, 777–778, and cases there cited. *Contra*, Cheshire, *op. cit.*, 390–391, who regards English maritime law as the sole test.

(*g*) Dicey, *op. cit.*, 778–783.

(*h*) Brett, L.J., in *Chartered Mercantile Bank of India, etc. v. Netherlands India Steam Navigation Co., Ltd.* (1883), 10 Q. B. D. 521, 537.

(*i*) *E.g.*, R. Temperley, *Merchant Shipping Acts* (4th ed. 1932).

(*j*) *Law of the Air* (1932), 94–103. See, too, Shawcross and Beaumont, *Air Law* (1945), para. 589.

(*k*) Amended by Air Navigation Act, 1936 (26 Geo. 5 & 1 Edw. 8, c. 44), Fifth Sched.

 § 51.

(iii) *Torts committed in aircraft in or over foreign land or waters.*—Whether the aircraft be British or not, the general rule stated in § 50 (*ante*) applies. If the act is not justifiable according to the foreign law *and* is tortious according to English law, an action in tort will lie in England; otherwise not. The same exception with respect to trespass to foreign land applies.

(iv) *Collisions between aircraft in the air.*—In general the foregoing rules apply, but the chief peculiarity here is that if the two colliding aircraft bear the nationality of one or more parties to the Convention on Aerial Navigation, 1919, or if the collision occurs over any part of Great Britain or Northern Ireland, the question of the observance or non-observance of the Rules of the Convention as to Lights, Signals and Air traffic, becomes a vital factor in determining the question of negligence (*l*).

(v) *Collisions between two objects of which one at least is on the water, e.g., between aircraft and ship.* Here there seems to be little doubt as to the existence of the jurisdiction on the principles stated above, and the chief difficulties are as to what particular English Court possesses it and whether it is maritime law that must be applied. Sir Arnold McNair's able discussion of these questions is rather too technical for reproduction in a students' book (*m*).

(*l*) Law of the Air, 99. The Convention is printed in Appendix A of Sir Arnold McNair's book.

(*m*) *Ibid.*, 100—103. Shawcross and Beaumont, *op. cit.*, para. 410. See, too, Air Navigation Act, 1936 (26 Geo. 5 & 1 Edw. 8, c. 44), s. 3; and Air Navigation Act, 1947 (10 & 11 Geo. 6, c. 18). The Act of 1947 empowers the Crown to make provisions, by Order in Council, for giving effect to the Chicago Convention on International Civil Aviation, 1944.

CHAPTER VII

DEATH IN RELATION TO TORT (a)

§ 52. Considered merely as a final catastrophe, death does not require a separate chapter in the law of tort, but for the reasons given below it has been made a separate topic in this book. In this branch of the law, it has two totally different aspects :—

§§ 52, 53.

Double aspect
of death.

(i) It may possibly extinguish liability for a tort. Here the question for discussion is : “ If I have committed a tort against you (not involving your death), and either of us dies, does your right of action survive ? ”

(ii) It may possibly create liability in tort. Here the question is : “ If I cause your death, is that a tort either (a) against you, so that your personal representatives can sue me for it; or (b) against persons who have an interest in the continuance of your life : *e.g.*, your wife or children ? ”

Now the first question assumes that a right of action already exists, and the sole inquiry is, “ Does it survive ? ” But the second question assumes nothing except that I have wrongfully caused your death, and the sole inquiry is, “ Is this a tort ? ”

Logically, therefore, question (i) ought to be relegated to the chapter on “ Extinction of Liability in Tort ” (b), and question (ii) should go to that part of this book which deals with specific torts under the particular heading “ Torts Causing Bodily Harm ”. But historically the two questions have been entangled with one another, and I think that partly for this reason and partly on the score of convenience they can be more intelligibly examined by treating them both in one chapter.

§ 53. (i) Death as extinguishing liability.

Suppose that I have inflicted a tort upon you, and that either of us dies, does your action survive? The answer to

(i) At
Common
Law, death
extinguished
liability.

(a) In 29 *Columbia Law Review* (1929), 239—254, I have examined the topic at length. That article is the basis of this chapter. American law for damages for loss of life is admirably summarised by Professor A. L. Goodhart in 82 *Law Journal Newspaper* (1936), 293—294, 311—312.

(b) *Post*, Chap. XXVII.

§§ 53, 54.

this by the Common Law was "No", but it has been almost turned into "Yes" by statute. The reason for the Common Law rule was this. In early times one method of seeking redress for a felony was an "appeal of felony". This was an accusation brought by the injured party himself and was much more of a private or civil proceeding than a public or criminal one, but it retained enough criminal flavour to make it cease if either appellor or appellee died pending it. When the writ of trespass was invented in King John's reign it had a close resemblance to an appeal of felony; in fact it has been called "an attenuated appeal" (c). Hence trespass, which was the parent of much of our modern law of tort, began life with a strong quasi-criminal character and on that ground the action for it did not survive the death of either plaintiff or defendant. Nor did there appear to be any injustice in this. If one has the habit of looking on a wrong as something very like a crime, it is a natural inference that nobody ought to be liable for it except the man who committed it. True, the argument is not so strong where it is the *plaintiff* in trespass who dies. Why should not his successors sue the defendant if he is still alive? The answer apparently is that the rule that an appeal perished, whether it was the appellor or appellee who died, seems to have infected the law as to transmissibility of the action of trespass, and the infection passed from trespass to actions in tort generally.

As will be seen below, there were some exceptions at Common Law and some partial statutory exceptions in 1267, 1292 and 1330, but the fact remains that for five centuries between 1330 and 1833 the law stood still and the general rule held good (d).

*Actio
personalis
moritur cum
persona.*

✓ § 54. *Actio personalis (e) moritur cum persona.*—So far I have said nothing of this maxim. Its connexion with the

(c) Pollock & Maitland, *Hist. of Eng. Law*, ii, 526.

(d) This is one of the puzzles of our legal history. The solution of it seems to be twofold. In the first place it may have been the criminal hue which coloured trespass for a long time. Crime is a very personal matter. Death pays all when the criminal is gone. And even if he survives and it is the injured party who dies, surely it is the King and not the dead man's representatives who should take up redress. But this criminal tinge had disappeared from trespass long before 1833. A second reason is suggested by Sir William Holdsworth for the persistence of the rule: *H. E. L.*, iii, 582—583. Testators often directed their executors to make good the wrongs which they had done, and even if the tortfeasor died intestate his administrator was bound to devote part of the estate to pious uses, among which some authorities reckoned restitution for injuries.

(e) The theory that "*personalis*" is a mistake for "*poenalis*" is unsound.

history of the topic must now be examined. It is derived from neither the Roman Law nor the Canon Law. Bracton was unjustly accused by a later generation of its parentage. Others have hinted that Coke invented it, but that is not so, though it is just the sort of thing that was a savoury bakemeat in his mouth. I cannot trace it in the Year Books earlier than 1479 (f). It gradually came into use and it was discussed judicially in *Pinchon's Case* (1611) (g) and in *Hambly v. Trott* (1776) (h) and in later cases which were concerned not only with the extinction of liability for tort by death, but also with the creation of liability in tort by death; and it has (I think wrongly) been put forward in modern times as the reason for extinction in the one case and for denial that liability can be created in the other. In fact, an investigation of the earlier authorities (i) leads to a very different conclusion, which is that the maxim is hardly ever mentioned without being limited to *personal* torts like ~~assault and battery~~, and in that shape it merely stated in Latin a long-established principle of which it was neither the historical cause nor the rational explanation. It was pregnant with a good deal more mischief than was ever born of it, for it really had no influence on the rule as to extinction of liability in tort which we are now discussing, nor has it been certainly traced as the origin of the rule (discussed in § 56, *post*) that death cannot create liability in tort, or as having had more than a trifling effect on its development. Its worst crime is that it has introduced an element of confusion between these two rules, which, as was stated at the beginning of this chapter, have nothing to do with each other and which really belong to different branches of the law of tort. Like some other Latin maxims which have been invented or adopted by our law, we should have missed nothing if it had never found its way there.

§§ 54. 55.

§ 55. *Exceptions*.—We now pass to the exceptions to the rule that death extinguishes liability in tort.

Exceptions to rule (i)

(1) *At Common Law*.—The two chief (k) ones are :

(1) *At Common Law*

(f) Y. B. Mich. 18 Edw. 4, f. 15, pl. 17.

(g) 9 Rep. 86, 87 a.

(h) 1 Cowp. 371.

(i) Examined in 29 Columbia Law Review, 244—249.

(k) There were minor ones : e.g., the writ *quod permittat prosternere* for nuisance : Y. B. Hil. 17 Edw. 3 (Rolls Series), 148—152. See, for others, *ibid.*, 190—191, and Bacon's Abridgment (7th ed. 1832), tit. Executors and Administrators (O), 2; Williams, Executors and Administrators (12th ed. 1930), ii, 1131—1134.

§ 55.

(a) Contract.

✓(a) Actions on contract. This was recognised to be law at least as early as 1611, "for death is no discharge of . . . debt; and it would be a great defect in our law, that no remedy should be given for it" (l). It may seem that this exception is relevant to the law of contract and not to the law of tort, but it must be recollected that most of our modern law of contract had its origin in tort.

(b) Enrichment of tortfeasor's estate.

✓(b) Where property, or the proceeds or value of property, belonging to the plaintiff have been appropriated by a person since deceased and have been added to his own estate or moneys, the plaintiff can sue the deceased's personal representatives (executors or administrators) for the recovery of such property, its proceeds or value.

Thus in *Sherrington's Case* (1582) (m), the executors were held chargeable for one hundred oaks and twenty oxen which the testator had wrongfully taken away from the claimant's land. The exception is much older than *Sherrington's Case*, for Bracton drew a distinction between a penal obligation which was wiped out by death and an obligation to restore property which was not (n). And this principle was worked out in the law of actions. One of the oldest remedies for the recovery of goods wrongfully detained by another person was detinue. This action survived against the executors of the detainer. Perhaps one reason why it did so was that it had not the criminal taint of the action of trespass. But another reason regarded the matter from a different angle. It was said that the executor was obliged by law to know what were the goods of the testator and that he had no right to retain those which were not (o). In the seventeenth and eighteenth centuries detinue was practically superseded by the action for trover, and as trover was distinctly delictal in character, the executor could not be compelled to make restitution by it; it vanished with the wrongdoer's death (p). But meanwhile the idea had sprung up that the executor's duty to restore was based on an implied contract or upon quasi-contract and that he could therefore be made liable to restore the property in an action of assumpsit.

(l) *Pinchon's Case*, 9 Rep. 86, 88 b.

(m) Sav. 40.

(n) *De legibus Angliae*, ff. 101 a. 102 a.

(o) Holdsworth, H. E. L., iii, 576—583, where the history of the exception is traced.

(p) *Hambly v. Trott* (1776), 1 Cowp. 371.

The exact extent of the executor's obligation under this heading was somewhat obscure until 1883, when the Court of Appeal clarified it in *Phillips v. Homfray* (q). There the deceased had wrongfully taken a quantity of minerals from under the plaintiff's farm. The plaintiff claimed from his executors (1) the value which the minerals had at the pit's mouth; (2) compensation for use by the deceased of the passages in the mine for the purpose of bringing the minerals to the pit's mouth; (3) compensation for injuries to these passages. The injuries had been committed more than six months before the deceased's death, so that the Civil Procedure Act, 1833 (*infra*), had no application (r). The Court of Appeal were unanimous in holding that claim (1) was good on the principle stated at the head of this sub-section. They were also agreed that claim (3) was bad, for it was a claim for trespass and that had perished with the testator. But it was only by a majority that they held that claim (2) was also bad. If it were founded on trespass, it was based on a liability which death had extinguished; if on quasi-contract, it was unsound, for quasi-contractual obligation depended upon enrichment of the deceased's estate and his mere use of the passages had added nothing to it. A less technical reason was the unfairness of making executors liable for indirect benefit to the deceased's estate which was quite untraceable *in specie* and was probably incapable of assessment in money without plunging them into litigation (s).

(2) *By statute*.—The statutory exceptions are now embodied principally in the Law Reform (Miscellaneous Provisions) Act, 1934 (*infra*). It replaced and amended the provisions of some earlier enactments which are briefly noticed here (t).

(2) By statute.

(a) An Act of 1330 (u), as amended by an Act of 1351— (a) Act of 1330.

(q) 24 Ch. D. 439.

(r) Since the Law Reform (Miscellaneous Provisions) Act, 1934 (24 & 25 Geo. 5, c. 41), s. 1 (3) (a), the action would have been maintainable because proceedings for it were pending at the date of deceased's death. It had been commenced in 1866 and he died in 1881; and by the Act it is sufficient if the proceedings were pending or if the cause of action arose not earlier than six months before his death.

(s) 24 Ch. D. 454—456.

(t) The Statute of Marlborough. 1267 (52 Hen. 3, c. 59), and an Act of 1292 (20 Edw. 1, st. 2)—its authenticity is doubtful—made very partial exceptions. Both have been repealed.

(u) 4 Edw. 3, c. 7.

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1852 (a), and expanded by interpretation (b) enabled the personal representatives to sue for any injury done to the personal estate of one since deceased. This legislation was replaced by the Administration of Estates Act, 1925 (c).

(h) Act of
1833.

(b) Civil Procedure Act, 1833 (d). This enactment filled up most of the gaps left by the Act of 1830, at any rate so far as injuries to property were concerned. Its provisions on this point were embodied in the Administration of Estates Act, 1925 (e), and, as they have ceased to be law, they can be relegated to a footnote (f).

(c) Law
Reform Act
of 1934.

(c) *The Law Reform (Miscellaneous Provisions) Act*, 1934 (24 & 25 Geo. 5, c. 41).

This Act repealed the Administration of Estates Act, 1925, on the points mentioned above. The chief reason for the Act of 1934 was the fact that the defects of the existing law were forced upon the attention of the Legislature by the growth of motor traffic, just as, a hundred years ago, the growth of railway traffic led to the passing of the Fatal Accidents Act, 1846. But in 1934 the evil was worse, for where the railway slew its scores the motor vehicle killed its hundreds. A specially hard case was that of a person severely injured or killed by the negligence of a motor driver who himself was killed in the accident. Nothing was recoverable by the survivor (or his representatives if he were killed) against the estate of the dead tortfeasor, and it often happened that the man injured or

(a) 25 Edw. 3, st. 5, s. 5.

(b) Summarised by Bramwell, L.J., in *Twycross v. Grant* (1878), 4 C. P. D. 40, 45.

(c) 15 Geo. 5, c. 23, s. 26 (1).

(d) 3 & 4 Will. 4, c. 42, s. 2.

(e) 15 Geo. 5, c. 23, s. 26 (2), (5).

(f) (1) The personal representative could maintain for any injury committed to the *real estate* of the deceased within six months before his death any action which the deceased himself could have maintained, but the action must be brought within one year after his death.

(2) An action might be maintained against the personal representative of a deceased person for any wrong committed by the deceased within six months before his death to another person's *real or personal property*, but the action must be brought within six months after the personal representative had taken out representation.

As to (2) it was held that where the injury was a continuing one, such as obstruction of ancient lights, it was immaterial that the wrong commenced more than six months before the injured person's death provided that it lasted into that period and that the action was brought within six months after the representatives had taken out representation; *Jenks v. Clifden*, [1897] 1 Ch. 624. This rule was applied in *Woodhouse v. Walker* (1880), 5 Q. B. D. 404, to permissive waste, the assumption being that it was a tort. The same result was reached in *Jay v. Jay*, [1924] 1 K. B. 826, by holding that an action for such waste was not based on tort and that the Civil Procedure Act, 1833, had therefore no application to it at all.

killed by the deceased's negligence had not insured himself against injuries or death. The Road Traffic Act, 1930 (g), made it compulsory upon owners of cars to insure against "third party" risks, and it was seen that if this provision was to be of any use to the third party who was injured or killed in a case like that above, provision must also be made that death of the wrongdoer should not affect his remedy.

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The Act of 1934 was therefore passed and it may be thus summarised :

(1) All causes of action subsisting against or vested in any person on his death shall survive against or, as the case may be, for the benefit of his estate (h). But this does not apply to causes of action for (i) defamation, or (ii) seduction, or (iii) inducing one spouse to leave or remain apart from the other, or (iv) damages for adultery (i).

(1) Survival of causes of action.

The earlier law had limited the survival of actions to torts affecting property. The Act of 1934 extends such survival to torts affecting the person, subject to the exceptions just mentioned.

Judicial interpretation of the Act in *Rose v. Ford* (k) shows that it preserves a cause of action which the injured party had before he died. The Act does not create a cause of action for death itself and it does not alter the Common Law rule that no such cause of action exists, apart from exceptions, statutory and otherwise (discussed in § 56, post). This proposition is well illustrated by negligence which causes the death of the injured party. Let us suppose, first, that A's negligence, although it does not kill B, nevertheless injures him so seriously that it shortens his expectation of life; the Court of Appeal held in *Flint v. Lovell* (l), before the passing of the Act, that this diminished expectation of life could be included as damages in B's action for negligence against A (m). Next, suppose that B actually dies as the result of A's

(g) 20 & 21 Geo. 5, c. 43, Pt. II.

(h) For the appointment of an administrator where there is no personal representative, see *Simpson, In the Estate of*, [1936] P. 40.

(i) 24 & 25 Geo. 5, c. 41, s. 1 (1) As to payment into Court, see *Dawson v. Spaul* (1935), 152 L. T. 441.

(k) [1937] A. C. 826 (W. Cases, 74).

(l) [1935] 1 K. B. 354.

(m) MacKinnon, J., in *Slater v. Spreag*, [1936] 1 K. B. 83, regarded *Flint v. Lovell* as applicable only where mental anguish is caused to the injured party by the prospect of an earlier death, and he refused to allow any damages under this head where the person was unconscious from the moment of injury until death, but this view is untenable since *Rose v. Ford*, *supra*.

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negligence. In that event, the cause of action for negligence which arose in B's lifetime is preserved by the Act of 1934 and the claim for damages for loss of expectation of life is therefore equally preserved; such was the decision in *Rose v. Ford*. But the Act does not erect the infliction of death into a new tort; under it, death does not create a cause of action, but is merely the necessary fact that makes it possible for an existing cause of action to survive.✓

In *Rose v. Ford* (n), the defendant negligently caused a collision of motor cars in which X, a young woman, was severely injured. Two days after the accident her leg had to be amputated. Four days after the accident she died as the result of her injuries, having been unconscious nearly all the four days. X's father sued under the Act of 1934 for the benefit of her estate, claiming damages for (i) X's pain and suffering; (ii) X's loss of her leg; (iii) diminution of X's reasonable expectation of life. The House of Lords held as to (i) that damages must be limited to the four days during which X survived the accident and they fixed them at £20; (ii) that X would have been entitled to only nominal damages✓ (40s.) for the loss of her leg, because she survived the amputation only two days, and that her father could recover no more than that for the benefit of her estate; (iii) that the father could recover damages (£1,000) for X's loss of expectation of life. In a later decision, *Lewis, J.*, held that the cause of action survives even if there be but a split second between the injury and the ensuing death (o). The learned Judge commented on the extreme difficulty of proving that any death was instantaneous, and hinted that this might to some extent stultify the view in *Rose v. Ford* that the Act of 1934 does not make death itself a cause of action.✓

The mode of assessing in terms of money a "reasonable expectation of life" has caused Judges and juries a good deal of difficulty in the numerous actions that have been tried since *Rose v. Ford* (p). In *Benham v. Gambling* (q), the House of Lords laid down rules with respect to this which may be thus summarised: (i) The thing to be valued is not the

(n) [1937] A. C. 826 (W. Cases, 74).

(o) *Morgan v. Scoulding*, [1938] 1 K. B. 786. See 57 L. Q. R. 462.

(p) The cases are collected in English and Empire Digest, Supplement, 1941, title "Negligence", Nos. 953b—953t. Cf. 16 Canadian Bar Review (1938), 119—132 (F. A. Brewin); 193—201 (Dr. C. A. Wright).

(q) [1941] A. C. 157 (W. Cases, 82).

prospect of length of days but of a predominantly happy life. Therefore the actuarial test is not of much value, though it may be relevant, *e.g.*, in cases of extreme old age. (ii) The capacity of the deceased to appreciate that his further life would bring him happiness is irrelevant; the test is objective, not subjective. (iii) Damages are in respect of loss of life, not of loss of future pecuniary prospects. (iv) Assessment is so difficult that very moderate damages should be given, and even less for a very young child, because its future is so uncertain (r). (v) Wealth and social status must be ignored, for happiness does not depend on them. This decision probably stemmed the rising tide of actions that inundated the Courts in consequence of *Rose v. Ford*; many of them were largely of the "gold-digging" type in the sense that they would probably not have been brought if the amount of damages likely to be recovered were small, and the House of Lords have now said that they will be small (s).

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(2) Where a cause of action survives, the damages recoverable for the benefit of the estate (i) shall not include exemplary damages; (ii) shall, if the cause of action is infliction of death, be calculated without reference to any loss or gain to the deceased's estate consequent on his death, except that funeral expenses may be included (t).

(2) Damages recoverable,

The commonest application of the rule in 2 (ii) is that it makes irrelevant any gain to the deceased's estate from a policy of insurance. Another application is that it prevents A's executors from recovering damages in the following case: A contracts with B to paint B's portrait for £500. The picture is half-painted when C kills A. A's executors cannot recover from C any part of the £500 which A would have earned if he had lived to complete the picture. Nor can they recover anything from B on the contract with him, for it was an entire contract the remuneration for which was £500 only if the contract were entirely performed, otherwise nothing (u).

(r) In *Benham's Case* the House reduced an award of £1,200 in respect of a child, two and a half years old, to £200.

(s) It is certain that the money recoverable is not a *solatium* for wounded feelings of the surviving relatives, comparable to that in Scots law: see 57 L. Q. R. (1941), 153, 297. Langton, J., suggested a reform of the law as to loss of expectation of life in 58 L. Q. R. (1942), 53—60.

(t) S. 1 (2).

(u) It has been questioned whether "exemplary damages" in 2 (i) include a *solatium*.

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(3) Time limitation.

(3) No proceedings in tort are maintainable under the Act against the estate of a deceased person unless either (a) the proceedings were pending against him at the date of his death, or (b) the cause of action arose not earlier than six months before his death and proceedings are taken in respect thereof not later than six months after his personal representative took out representation (v).

The chief amendment here is the introduction in (a) of an alternative to the very brief period of six months allowed by (b); (b) itself is taken over from the earlier legislation. As to proceedings for the estate of a deceased person, apparently the Limitation Act applies (*post*, § 188).

(4) "Subsisting" action.

(4) Where damage has been suffered by reason of any act or omission in respect of which a cause of action would have subsisted against any person if that person had not died before or at the same time as the damage was suffered, there shall be deemed, for the purposes of this Act, to have been subsisting against him before his death such cause of action in respect of that act or omission as would have subsisted if he had died after the damage was suffered (a). It would seem that this clause contemplates two types of cases:—

(i) Death of A simultaneous with his tort to B. Suppose that A, negligently driving his car, collides with, and injures, B, and that A is killed instantly. B can sue A's executors under this clause, which provides that the cause of action must be regarded as arising before A's death. B cannot sue under the clause discussed under (1) above, because his cause of action cannot be said to have been subsisting against A at the death of A, for A's death was coincident with the harm which he inflicted. Moreover, the clause will be useful in cases where A did in fact die after he had inflicted the harm, but within such a short time that B may find it practically impossible to prove that the death and the harm inflicted were not simultaneous.

(ii) Damage to B which emerges only after A's death. A, negligently driving his car, collides with B's car at 3 p.m. B is uninjured, but his car is put out of action. A dies at 3.30 p.m. B misses a professional engagement at 5 p.m. because his car is injured and thereby suffers additional

(v) S. 1 (3).

(a) S. 1 (4).

damage. B can claim for this additional damage, although A died before it was sustained. §§ 55, 56.

(5) The rights conferred by the Act are in addition to, and not in derogation of, any rights conferred on the dependants of deceased persons by the Fatal Accidents Acts, 1846 to 1908, or the Carriage by Air Act, 1932 (b), and so much of the Act of 1934 as relates to causes of action against the estates of deceased persons shall apply in relation to other causes of action not expressly excepted from the Act (c). (5) Right of action is cumulative.

It will be seen when we come to deal with the Fatal Accidents Act, 1846 (*post*, p. 197), that the action there is for the benefit of certain relatives of the deceased. Under the Act of 1934 the action is for the benefit of the deceased's estate (in which not only relatives but also creditors and beneficiaries under his will may be interested). Thus the actions under the two statutes are *diversis respectibus*. But damages are not recoverable twice over; thus, in assessing damages under the Act of 1846, any beneficial interest derived by a dependant from the estate of the deceased, by reason of its increase by an award under the Act of 1934, must be taken into account; and, conversely, if an award has already been made under the Act of 1846 the recipient of it may have his claim under the Act of 1934 reduced if the deceased died intestate and he succeeds to the deceased's estate (d).

§ 56. (ii) Death as creating liability.

(ii) Death.

If one man wrongfully kills another, is that a tort (a) against the person killed; or (b) against persons who have an interest in the continuance of his life? We must discuss these questions separately. At Common Law; death did not create liability.

The rule has two entirely different applications.

(a) *The infliction of death is not, as such, a tort against the person killed.* ✓ (a) Infliction of death is not a tort against deceased.

The reason for this rule takes us back once again to the old appeals of felony (e). The appropriate remedy for them was trial by battle, and if the appellee were defeated he was hanged forthwith. Now if A killed B, and were appealed of

(b) 22 & 23 Geo. 5, c. 36, Sched. II.

(c) 24 & 25 Geo. 5, c. 41, s. 1 (5).

(d) *Davies v. Powell Duffryn Collieries, Ltd.*, [1942] A. C. 601; *Ellis v. Raine*, [1939] 2 K. B. 180; *May v. McAlpine & Sons* (1933), 54 T. L. R. 850. As to contributory negligence, see the Law Reform (Contributory Negligence) Act, 1945, s. 1 (4).

(e) 29 Columbia Law Review, 239—241.

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homicide by B's relatives and were defeated in battle, his prompt hanging would have made any claim against him for damages impossible. But if A were pardoned by the King (as was usual if the homicide were by misadventure) that might save him from indictment but it did not destroy the relatives' right of appealing him, and they might make themselves extremely disagreeable by a threat of appeal unless A paid them money. And thus sprang up a singular form of white-washed blackmail, for bargains of this sort between the relatives and A were sanctioned by the Courts (f). Perhaps these stifled appeals gave the relatives all they needed and Professor Holdsworth (g) shrewdly suggested that this may have been the reason for the late survival of appeals in our law (h).

(b) Nor
against third
parties.

(b) *Loss resulting to third parties by the infliction of death is not a tort.* This is commonly known as "the rule in *Baker v. Bolton*".

Therefore if A kills B, C, who had an interest in the continuance of B's life, cannot at Common Law recover damages against A for the loss of B.

Now C may have had such an interest either because B was a relation of his, such as his father or son, or because B was one of his servants.

There is no lack of authority for the inability of a husband or parent to sue for the loss of services occasioned by the killing of his wife or child. The law may have been otherwise at one time (i), but the inability to sue was recognised in 1808 by Lord Ellenborough, in *Baker v. Bolton* (k), where he ruled that "in a civil court, the death of a human being could not be complained of as an injury". The plaintiff and his wife were passengers on the top of the defendants' stage-coach which was upset by the negligence of the defendants, "whereby the plaintiff himself was much bruised, and his wife was so severely

(f) Pollock & Maitland, *Hist. of Eng. Law*, ii, 482—485.

(g) *H. E. L.*, ii, 362—364.

(h) Whether the Fatal Accidents Act, 1846, ought to be classified as an exception to rule (a), *supra*, or to rule (b), *infra*, or to both, is an open question. The wording of the Act points in one direction, its judicial interpretation in another. Upon the whole, we prefer to treat it as an exception to rule (b).

(i) *Y. B. Mich.* 43 *Edw.* 3, f. 23, pl. 16; also in 44 *Lib. Ass.* pl. 13. *Higgins v. Batcher* (1606), *Yelv.* 89, was probably not a decision on destruction by death of the husband's claim in respect of his wife's consortium and services.

(k) 1 *Camp.* 493.

hurt that she died about a month after". The plaintiff recovered £100 for his own bruises and for the loss of his wife's society up to the moment of her death, but nothing for such loss after that event.

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Baker v. Bolton was only a ruling at *nisi prius*, not a single authority was cited and the report is extremely brief. In so far as Lord Ellenborough's *dictum* related to the loss of the deceased's services, it is said to have sprung from the rule that, where the same facts constitute a felony and a tort no action is maintainable for the tort unless there has been a prosecution for the felony (l). But nowadays the right of action in such circumstances is merely suspended, not destroyed, and indeed it is not clear that it ever was destroyed (m); so this reason, if it ever existed, has disappeared. In so far as the *dictum* was general, its basis can only be conjectured. At any rate, an action in respect of death (apart from a claim for loss of services occasioned by it) had never been successfully maintained down to *Baker v. Bolton* (n).

The rule in *Baker v. Bolton* was upheld in subsequent cases. In *Osborn v. Gillett* (o), E, the plaintiff's "daughter and servant" was killed by the negligent driving of the defendant's servant and the plaintiff claimed damages for the loss of E's service and for her burial expenses. It was held against the powerful dissent of Bramwell, B., that nothing was recoverable under either head (p). It was confidently expected in some quarters that the decision would be overruled at the first opportunity, but it was upheld by the Court of Appeal in *Clark v. London General Omnibus Co., Ltd.* (q), where the claim for funeral expenses was denied on the additional ground that the father was probably bound to bury his daughter in any event (r); and by the House of Lords in *Admiralty Commissioners v. S.S. Amerika* (s). In that case a submarine of the Royal Navy was run into and sunk by the negligence

(l) Holdsworth, H. E. L., iii, 331—336, 676—677, and in 32 L. Q. R. (1916), 431—437.

(m) *Ante*, § 39.

(n) 29 Columbia Law Review, 252—253.

(o) (1873), L. R. 8 Ex. 88.

(p) It is not clear why the action should not have been maintainable under the Fatal Accidents Act, 1846, *post*, p. 197. Scrutton, L.J., in *Berry v. Humm*, [1915] 1 K. B. 627, 632—633.

(q) [1906] 2 K. B. 648.

(r) *Ibid.* 659, 663—664.

(s) [1917] A. C. 38.

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of the steamship *Amerika*. The Admiralty Commissioners granted pensions to the relatives of those who were drowned in the submarine and then claimed the capitalised amount of the pensions from the owners of the *Amerika*. The claim failed, first, because of the rule in *Baker v. Bolton*, secondly, because the damages were too remote, since the pensions were not paid under any legal obligation upon the Admiralty, but were voluntary disbursements in the nature of compassionate allowances. With this second ground we are not here concerned, but why the rule in *Baker v. Bolton* should have been followed except on the ground of *vis inertiae* it is difficult to see. The historical arguments of two of the noble and learned lords are unconvincing (t).

(There is no doubt that the rule in *Baker v. Bolton* prevents a master from suing for the loss of service caused by the tortious slaying of the servant; nor has the Act of 1934 altered this (u). It is true that until *The Amerika* in 1916 no case is traceable in the reports in which a master sought to recover damages for the loss of a servant *stricto sensu*. In all cases before that decision the "servant" killed was related either as a wife or as a child to the plaintiff. Outside these, not only was such an action never successful, but it was apparently never even attempted (a).

Exceptions:
(1) At Com-
mon Law.
Contracts.

§ 57. *Exceptions to the rule in Baker v. Bolton.* ✓

(1) *At Common Law*.—Where the action is for loss of services by death created by a breach of contract between the plaintiff and the person who inflicted the fatal injury, the rule

(t) Lord Parker of Waddington and Lord Sumner. See Professor Holdsworth in *Hist. of Eng. Law*, iii, 676–677, and in 32 *L. Q. R.* (1916), 431–437.

(u) *Rose v. Ford*, [1937] *A. C.* 827, 833, 850–852.

(a) 29 *Columbia Law Review*, 250–252. Why this was so can only be conjectured. It may have been because the killing would often be felonious (Holdsworth, *H. E. L.*, iii, 434) and conviction of the felon with consequent forfeiture of his property made it futile to sue him; or because, if the killing were not felonious or if the alleged felon were not convicted or were pardoned, other servants were procurable with sufficient ease to make the death of one no outrageous grievance to his employer.

I have said that *actio personalis moritur cum persona* had really very little effect on the history of death as an element in either destroying or in creating liability in tort, and I must add here that, whatever may have been the iniquities of this maxim, it was not even mentioned in *Baker v. Bolton*, nor had it any real effect in producing the decisions which upheld that case: *Osborn v. Gillett* (1873), *L. R.* 8 *Ex.* 88 (if attention be confined to the judgments); *Clark v. L. G. O. Co.*, [1906] 2 *K. B.* 648; *Admiralty Commissioners v. S.S. Amerika*, [1917] *A. C.* 38 (Lord Sumner, at p. 60). But in *Seward v. Vera Cruz* (1884), 10 *App. Cas.* 59, 67, 70, Lord Selborne, *L.C.*, and Lord Blackburn were misled as to its historical effect.

in *Baker v. Bolton* does not apply. In *Jackson v. Watson* (b) the plaintiff bought from the defendant tinned salmon. His wife ate some of it and died. He sued for the loss of her services and the Court of Appeal held that the action was maintainable, for the wife's death was no essential part of the action but only an element in ascertaining the amount of damages for the breach of contract.

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(2) By Statute.

(a) *The Fatal Accidents Act, 1846*.—When railways were coming into use in England, fatal accidents multiplied apace, and this made reform of the law imperative; as it stood, if there was to be an accident at all, the more people who broke their necks instead of being merely injured in it, the better for the railway company; for, while injured survivors could recover heavy damages, the relatives of those who died could recover nothing. In 1846, the old Common Law rule was greatly modified by the Fatal Accidents Act (c), which is often referred to as Lord Campbell's Act.

(2) By statute.
(a) Fatal Accidents Act, 1846.

It provides that whenever the death of a person is caused by the wrongful act, neglect or default (d) of another, such as would (if death had not ensued) have entitled the injured person to sue and recover damages in respect thereof, then the person who would have been liable if death had not ensued shall be liable to an action for damages, although the death shall have been caused under such circumstances as amount to a felony. This last proviso releases the person suing from the necessity of prosecuting for the felony before he sues on facts amounting to a tort (e).

The persons who are entitled by the Act to sue are the executor or administrator of the deceased for the benefit of the deceased's wife, husband, parent, child, grandparent, grandchild, step-parent and step-child (f). The action must be commenced within twelve calendar months of death (g).

Who can sue.

(b) [1909] 2 K. B. 193.

(c) 9 & 10 Vict. c. 93.

(d) Held, in *Grein v. Imperial Airways, Ltd.*, [1937] 1 K. B. 50, to include breach of contract as well as tort.

(e) *Ante*, p. 160.

(f) Ss. 2, 5. A posthumous child is included: *The George and Richard* (1871), L. R. 3 Ad. & E. 466; a bastard child was not (*Dickinson v. N. E. Ry.* (1863), 33 L. J. Ex. 90), but is now, under the Act of 1934. It is immaterial that the deceased was an alien, provided he was otherwise qualified to sue: *Davidsson v. Hill*, [1901] 2 K. B. 606.

(g) S. 3.

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An amending Act of 1864 (*h*) enables the persons mentioned to bring the action themselves if the executor or administrator does not sue within six months of the deceased's death. The Law Reform* (Miscellaneous Provisions) Act, 1934 (24 & 25 Geo. 5, c. 41), s. 2 (1), allows the remedy to parents or grandparents or children or grandchildren of the deceased person even if the relationship were only illegitimate or adoptive.

The Act
created a
new action.

Although the Act indicates that no action is maintainable unless the deceased person himself could have sued, it has been said that the action is "new in its species, new in its quality, new in its principle, in every way new" (*i*), and in *Pym v. G. N. Ry.* (*k*) it was held that the expressions in the Act about the deceased person being entitled to sue do not refer to the nature of the loss or injury sustained but merely to the circumstances in which the bodily injury arose and the nature of the wrong of which complaint is made. The result is that, provided the deceased had a cause of action, damages are often recoverable under the Act which the deceased himself could not possibly have recovered. His capacity to have sued is relevant only in connexion with defences that might have been pleaded against him if he had lived. Thus no action lay under the Act if his claim would have been barred by his contributory negligence (*l*); or if by contract or agreement with the defendant he had precluded liability for the type of harm inflicted on him (*m*); but if the contract merely limits the amount which is recoverable (*e.g.*, a workman's railway ticket limiting liability for accidental harm to £100) and the deceased did not in his lifetime discharge the defendants from their liability, the action of the relatives is not barred, and quite possibly they may recover more than this limited amount; for he could have sued for *some* damages, and that is enough to give them a new and distinct cause of action in respect of which damages are estimated on an entirely different basis (*n*). Again, the action is barred if before his death he had

(*h*) 27 & 28 Vict. c. 95, s. 1.

(*i*) Lord Blackburn, in *Seward v. Vera Cruz* (1884), 10 App. Cas. 59, 70-71.

(*k*) (1862), 2 B. & S. 759; 4 B. & S. 396.

(*l*) *Senior v. Ward* (1859), 1 E. & E. 385; *Wright v. M. Ry.* (1884), 51 L. T. 539.

(*m*) *Haigh v. Royal Mail Steam Packet Co., Ltd.* (1883), 52 L. J. Q. B. 610; *The Stella*, [1900] P. 161; *Griffiths v. Dudley* (1882), 9 Q. B. D. 357.

(*n*) *Nunan v. S. Ry.*, [1924] 1 K. B. 223.

accepted compensation in full satisfaction of his claim (o); although a mere agreement that the liability of the defendant shall not exceed a certain sum will not limit the claim of the dependants if the deceased did not in fact accept compensation (p). So, too, his claim may have been barred by lapse of time under some statute of limitation (q); but if it was not thus barred at the date of his death, it is probably law that the period of time which has already run has no effect whatever on the claim of the relatives, and that the year within which they must pursue it begins at his death (r).

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These and other cases show that, in order to decide whether the deceased's claim has been destroyed, "the *punctum temporis* at which the test is to be taken is at the moment of death, with the idea fictionally that death has not taken place" (s). If at that moment he either had no cause of action or a defective one, his relatives will have none. But if he had one, many other authorities show that the action open to the relatives under the Act has nothing whatever to do with his claim.

The Act itself is remarkably reticent about what is recoverable and the Courts have had their hands pretty full in implementing it on this point. All that it expressly provides is that the jury may give damages in such proportions as they think fit to the various persons on whose behalf the action is brought (t), but it "does not in terms say on what principle the action it gives is to be maintainable, nor on what principle the damages are to be assessed; and the only way to ascertain what it does, is to show what it does not, mean". So Pollock, C.B., in *Franklin v. S. E. Ry.*, and the learned Chief Baron then adopted the test that damages must be calculated "in reference to a reasonable expectation of pecuniary benefit as of right, or otherwise, from the continuance

What is recoverable.

(o) *Read v. G. E. Ry.* (1868), L. R. 3 Q. B. 555. Apparently the liability in tort is destroyed from the moment at which his agreement to accept compensation is made, even before the money is paid: *British Russian Gazette, etc., Ltd. v. Associated Newspapers, Ltd.*, [1933] 2 K. B. 616.

(p) *Nunan v. S. Ry.*, [1924] 1 K. B. 223; *Grein v. Imperial Airways, Ltd.*, [1937] 1 K. B. 50.

(q) *Williams v. Mersey Docks and Harbour Board*, [1905] 1 K. B. 804.

(r) *Contra, Markcy v. Tolworth, etc., Board*, [1900] 2 Q. B. 454, but it was disapproved by the Judicial Committee in *British Columbia Electric Ry. v. Gentile*, [1914] A. C. 1034, and was not followed in *Venn v. Tedesco*, [1926] 2 K. B. 227.

(s) *British Columbia Electric Ry. Case* (last note), at p. 1041.

(t) S. 2.

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of the life" (u). If, therefore, the relations have suffered only nominal damages, or none at all, they can recover nothing (a). Where a son, who worked for his father at full wages under a contract, was killed, his father was held to have no claim; for though he had lost the son's services he could not prove that he had lost any pecuniary benefit since he had paid full wages for them (b). Further, the principle excludes anything like a *solatium* for mental suffering and anguish for the loss of the deceased, for that would lead to awkward inquiries as to the claim of a child who was unborn, unfilial or a lunatic (c). Nor is a mere speculative possibility of pecuniary benefit sufficient, as where the person killed was aged four years and his father proved nothing except that he had intended to give the child a good education (d).

Again, nothing was recoverable for funeral and mourning expenses, for there is nothing in the statute which refers "to the cost of the ceremonial of respect paid to the memory of the deceased in his funeral, or in putting on mourning for his loss" (e). But the Law Reform (Miscellaneous Provisions) Act, 1934, s. 2 (3), now makes recoverable funeral expenses that have been incurred by the parties for whose benefit the action is brought.

On the other hand, there may be a reasonable expectation of pecuniary benefit although the relatives had no legal claim to support by the deceased, as where a son who was killed had voluntarily assisted his father in the father's work (f), or where he once gave him money during a period of unemployment (g), or where a wife who was killed had gratuitously performed the ordinary household duties (h). Indeed, it is not necessary that the deceased should have been actually earning anything or giving any help, provided there is a reasonable probability, as distinct from a bare possibility, that he will do so; as where the deceased was a girl of sixteen years who lived with her parents, was on the eve of completing her apprentice-

(u) (1858), 3 H. & N. 211, 213—214. The italics are mine.

(a) *Duckworth v. Johnson* (1859), 29 L. J. Ex. 257.

(b) *Sykes v. N. E. Ry.* (1875), 44 L. J. C. P. 191.

(c) *Blake v. M. Ry.* (1852), 18 Q. B. 93, 110.

(d) *Barnett v. Cohen*, [1921] 2 K. B. 461.

(e) *Dalton v. S. E. Ry.* (1858), 4 C. B. (N.S.) 296, 306, *Clark v. London General Omnibus Co., Ltd.*, [1906] 2 K. B. 648.

(f) *Franklin v. S. E. Ry.* (1858), 3 H. & N. 211.

(g) *Hetherington v. N. E. Ry.* (1882), 9 Q. B. D. 160.

(h) *Berry v. Humm*, [1915] 1 K. B. 627.

ship as a dressmaker and was likely in the near future to earn a wage which might quickly have become substantial (i).

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Assuming that a reasonable expectation of pecuniary benefit can be proved, it may nevertheless be reduced in amount by circumstances, such as the award of a Crown pension to a wife on her husband's death (k). But by the Fatal Accidents (Damages) Act, 1908 (l), no reduction is to be made on account of "any sum paid or payable on the death of the deceased under any contract of assurance or insurance, whether made before or after the passing of this Act" (m).

Liability under the Fatal Accidents Act does not cancel liability on other grounds, and damages may be recoverable both under the Act and on one of these other grounds. In *Leggott v. G. N. Ry.* (n), a season-ticket holder on the defendants' railway was injured by their negligence and died a few months later. His widow sued as administratrix under the Fatal Accidents Act and recovered compensation. She then brought a second action as administratrix for the expenses of medical attendance to her husband during the period between the accident and his death and for damages for the loss which he had sustained by not being able to attend to his business. It was held that the first action was no bar to the second. In the first action she was suing on behalf of herself as a beneficiary under the Act, while in the second she was suing on behalf of her husband for the breach of contract with him which the defendants had committed—a cause of action preserved by the Act of 1930 (ante, § 55).

(b) *The Employers' Liability Act, 1880* (o), and the *National Insurance (Industrial Injuries) Act, 1946* (p), make exceptions to the doctrine of common employment by (*inter alia*) enabling the representatives of a workman, who is killed in the course of his employment, to claim limited damages under the Act of 1880 and "death benefit" under the Act of 1946.

(b) Acts of
1880 and
1946.

(i) *Taff Vale Ry. v. Jenkins*, [1913] A. C. 1.

(k) *Baker v. Dalgleish Steam Shipping Co.*, [1922] 1 K. B. 361; followed in *Johnson v. Hill*, [1945] 2 A. E. R. 272. See, too, *Pym v. G. N. Ry.* (1863), 4 B. & S. 396.

(l) 8 Edw. 7, c. 7.

(m) The Widows', Orphans' and Old Age Contributory Pensions Act, 1936 (26 Geo. 5 & 1 Edw. 8, c. 33), s. 40, provides that no account is to be taken of any widows' pension, additional allowance or orphans' pension payable under that Act.

(n) (1876), 1 Q. B. D. 599.

(o) 43 & 44 Vict. c. 42

(p) 9 & 10 Geo. 6, c. 62, ss. 19–35.

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Criticism of
the existing
law.

§ 58. The mere reading of the preceding sections of this chapter is enough to show that the law was in a deplorable condition until the Act of 1934 and that even now it is not entirely satisfactory.

As to extinction of liability, the legislative efforts which stretched over six hundred years did not go far enough. They provided that if A committed a tort against B (not involving B's death) and either A or B died before an action was brought, the remedy would not survive unless the injury were to B's *property*. For personal torts like assault, defamation and negligent bodily injury, the claim perished. Why this should have been so where it was the tortfeasor who died no one could say (*q*). The Act of 1934 wiped out the distinction between injuries to property and injuries to the person, but it expressly provides that actions for defamation, seduction and enticement of a spouse are not maintainable after death. The reason for these exceptions is the difficulty of trying actions of this sort in the absence of plaintiff or defendant (*r*).

Where it was the injured party who had died, there was more to be said in favour of the old rule which extinguished an action for personal injuries; for it is consonant neither with abstract justice nor with the law of tort that a man's successors should profit by a wrong which in origin did *them* no harm. However, the Act of 1934 provides for survival of actions where the injured party has died but excepts actions for defamation, seduction and enticement of a spouse (*s*).

As to the creation of tortious liability by death, the Fatal Accidents Act, or rather its judicial interpretation, has done much to improve the law, but we have still this remarkable anomaly which is left untouched by the Act of 1934. If you negligently injure a man's servant, it is less expensive for you (apart from criminal law) to kill him outright than merely to hurt him; for (i) if he is merely hurt, he can sue for the injury to himself, and his employer can sue for the loss of his services, while (ii) if he is killed, the only actions maintainable are those by his representatives under the Fatal Accidents Act, 1846, or under the Act of 1934. Two of the noble and learned Lords

(*q*) 29 Columbia Law Review, 219.

(*r*) Law Revision Committee, Interim Report, 1934, Cmd. 4540, p. 7. Cf. 14 Canadian Bar Review (1936), 649.

(*s*) In Massachusetts, among actions which survive are "tort for assault, battery, imprisonment, or other damage to the person".

in *Admiralty Commissioners v. S.S. Amerika* (t) appreciated the illogicality of this and hinted that the anomaly lies in the existence of the employer's action in (i) and that he ought no more to have a remedy for the servant's injury than for his death. With due respect, it is suggested that he ought to have a remedy in both cases. It may be conceded that all unskilled labour (e.g., the work of a porter) and a good deal of skilled labour (e.g., that of a chauffeur) is easily replaceable in normal times, and that an employer would suffer so little damage by the killing of, or injury to, such workers, that he ought to have no action. But it would be practically impossible for a statute to draw the line between such workmen and highly skilled servants (e.g., machinists in a secret process manufacture, or confidential clerks) where heavy loss might ensue from delay or inability in procuring satisfactory substitutes; and the better plan would be to allow the action in all cases, and to rely upon the existing safeguards against bringing trumpery or vexatious litigation. At any rate, the House of Lords do not appear to have produced any convincing reason either for abandoning the employer's remedy for injury to the servant (which they grudgingly admitted to be law), or for preventing Parliament from giving the employer a remedy for the servant's death, which they emphatically denied to him.

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(t) [1917] A. C. 38, 48, 60.

CHAPTER VIII

CLASSIFICATION OF PARTICULAR TORTS

§§ 59, 60.

Scientific
classification
impractic-
able.

§ 59. In the course of English legal history certain forms of tortious liability have gained specific names, such as assault, battery, libel, slander and nuisance. The fact that they acquired such names was due to mere accidents of terminology traceable probably to their frequent occurrence. In the following chapters it is proposed to deal with these particular torts. But it is important to remember that they do not exhaust the contents of tortious liability (*ante*, § 7). Outside these nominate torts there are wrongs which are well known to exist but which have no compendious name, such as interference with a parliamentary vote; beyond these again are wrongs which may possibly be torts, but of which it is impossible to say whether they are such or not. Thus, as a family group, torts may be divided into those which received names soon after birth, those which seem to be awaiting baptism in their riper years and those whose paternity is uncertain enough to make it doubtful whether they ought to be included in the family at all.

The grouping of particular torts which have acquired names in any sort of classification is of no practical value except for purposes of exposition. And even for that it cannot possibly be scientifically complete, since the acquisition of these names was purely empirical. One can, of course, suggest what the classification of the law of tort ought to be, but that is matter for a book of jurisprudence, and here it could do nothing but confuse the reader because it would merely constitute an attempt to wrench intractable material into neat shapes that would have little real connexion with either the history or the present substance of the topic. The following classification is based mainly on convenience and pretends to no scientific accuracy.

Scheme
adopted.

§ 60. Following my definition of tortious liability I have made the liability of the defendant, and not the right of the plaintiff, the root of classification.

I. Wrongs to the person :

(1) Death.

- (2) Assault and battery.
- (3) False imprisonment.
- (4) Residuary trespass to the person.
- (5) Injuries affecting family relations.
 - (i) Husband and wife.
 - (ii) Parent and child.
- II. Wrongs to reputation (defamation including slander and libel).
- III. Wrongs to property :
 - (1) Trespass to land.
 - (2) Conversion and other wrongs to chattels
- IV. Wrongs to persons or to property :
 - (1) Deceit.
 - (2) Negligence.
 - (3) Nuisance.
 - (4) Conspiracy.
 - (5) Breaches of strict duties.
- V. Wrongs of interference with freedom of contract or *of business*.
- VI. Abuse of legal procedure :
 - (1) Malicious prosecution and civil procedure.
 - (2) Maintenance and champerty.
- VII. Miscellaneous torts.

CHAPTER IX

TRESPASS TO THE PERSON

§§ 61—63.

§ 61. Death.

Death.

Death as creating liability in tort has already been considered in Ch. VII.

Trespass to the person.

§ 62. Trespass to the person (a).

When the writ of trespass became common about A.D. 1250, it covered injuries to (i) the person; (ii) to goods; (iii) to land. It was generally said to be *vi et armis*, though this was a mere piece of pleader's abuse and neither violence nor weapons were needed to make the defendant liable.

Trespass to the person is the parent of (i) torts, some of which have acquired special names: e.g., assault, battery, false imprisonment and some of the torts described in the chapter on "Wrongs to Family Relations"; (b); (ii) some torts which have no special names and which may be conveniently styled "Residuary forms of trespass to the person"; these also are treated in a later section (c), but on one point they require immediate discussion.

Trespass to the person may be intentional or negligent.

§ 63. Trespass to the person and negligence.

The relation of trespass to the person to negligence is a problem which had better be disposed of here. In the current law of tort, negligence has two distinct meanings:—

// (i) It may mean one of the possible mental elements in committing some torts. Most torts can be committed either intentionally or negligently. And, as was explained earlier (d), negligence here signifies total or partial inadvertence (or in exceptional cases full advertence) of the defendant to his

(a) See 49 L. Q. R. (1933), 359—362.

(b) They are copiously illustrated in the older law in Brooke's Abridgement, Trespass, and are collected in the third edition of Bullen & Leake's Pleadings (1868), 410—414, under "Trespass to the Person". Modern editors of the book confine this heading to assault, battery and false imprisonment (9th ed. 1935), 521—523.

(c) *Post*, § 67.

(d) *Ante*, § 10 (ii).

conduct and/or its consequences, but unaccompanied by any desire for those consequences.

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(ii) It may mean a specific and nominate tort called "Negligence", the essentials of which are: (a) a legal duty to take care; (b) a breach of that duty by conduct on the part of the defendant in which his state of mind is that described in (i) above; (c) damage to the plaintiff or to his property as a consequence of that breach. Negligence as a specific tort is of comparatively modern origin (*post*, § 121).

Now it is difficult to set up any sharp boundary between trespass to the person and the tort of negligence. One is tempted to say—indeed one might infer as much from some of the current books on tort—that trespass to the person is always intentional, whereas negligence always involves inadvertence, never intention. But this is not so. It is quite true that trespasses to the person which have acquired special names (assault, battery, etc.) are nowadays associated almost exclusively with direct and intentional force on the part of the offender, but until comparatively modern times it was not in the least necessary that the injury should have been intentional; the liability was just the same even if the injury were inadvertent (*e*), nor do I know of any *decision* which makes it impossible even at the present day to commit a "negligent" battery (*i.e.*, one done by inadvertence as opposed to intention). As to residuary forms of trespass to the person, the case is even stronger; for it always has been, and probably still is, law that in general the defendant is liable no matter whether he acted intentionally or inadvertently (*f*). An exception to this is the case of accidental harm on or from the highway, which is considered below.

Trespass and negligence overlap.

It follows then that there are many cases in which trespass to the person and the tort of negligence overlap. Where this is so, it is usual nowadays, at any rate in "running-down" actions (*i.e.*, those arising from accidents caused by vehicles on the highway) for the plaintiff to contend that the facts establish alternatively trespass or negligence. Now the burden

Why claim for negligence is preferred.

(*e*) *Weaver v. Ward* (1616), Hob. 134; *Dickenson v. Watson* (1681), T. Jones, 205; *Dodwell v. Burford* (1670), 1 Mod. 24; *Gibbon v. Pepper* (1695), 2 Salk. 637; 1 Ld. Raym. 28; 4 Mod. 404; *Scott v. Shepherd* (1773), 2 W. Bl. 892.

(*f*) Although *du Parcq, J.*, in *Barnes v. Pooley* (1935), 153 L. T. 78, 79, declined to express an opinion on the point. Other authorities are cited in § 67, *post*.

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of proof is much lighter in trespass. All that the plaintiff need prove is that the defendant did the act that harmed him. Then it lies upon the defendant to justify the act if he can. But in the tort of negligence the plaintiff must prove the existence of a legal duty to take care, breach of that duty by the defendant and consequent injury to himself. Why, then, does he undertake this heavier onus of proof instead of relying on the fewer facts sufficient to establish trespass?

The answer to this is twofold. In the first place before the procedural reforms of the Judicature Acts, 1873—1875 (g), there were several respects in which the action for negligence was superior to the action for trespass (h). The former action was one “upon the case”, because the harm suffered was “consequential” and not direct, as in trespass, and there were considerable differences based upon this. And even since the Judicature Acts, the following points still hold good:

(a) In trespass the plaintiff may find it difficult to prove that the injury was direct not consequential.

(b) In certain cases of negligence, the mere fact that the accident happened raises a presumption that the defendant has broken a legal duty, as in *Byrne v. Boadle* (i), where a barrel of flour fell out of a warehouse upon the plaintiff in the highway. This doctrine is known as res ipsa loquitur (k). Where it is applicable the plaintiff gains almost nothing by alleging trespass rather than negligence, for the burden of proof is much the same in both.

(c) Where, as frequently happens in accidents due to vehicles, the injury is due to negligence of the defendant's servant while in charge of the vehicle, trespass is usually inappropriate, for the harm done was not by the direct act of the defendant unless the facts show that the servant's act was in effect the act of the defendant (l).

Peculiar rule
as to highway
accidents.

But a second explanation, which has nothing to do with procedural history, is that where the plaintiff has been injured (m) *by a negligent accident on the highway* he has been

(g) 36 & 37 Vict. c. 66; 38 & 39 Vict. c. 77.

(h) 49 L. Q. R. (1933), 364—367.

(i) (1863), 2 H. & C. 722.

(k) *Post*, § 124

(l) *Chandler v. Broughton* (1832), 1 Cr. & M. 29; *Smith, Master and Servant* (8th ed. 1931), 264.

(m) This rule applies to his chattels also—in fact to any injury done on or from the highway to property on or adjoining the highway: 49 L. Q. R. 362—363, 367 *et seq.*

obliged for about the last fifty years to sue, if he sues at all, for the tort of negligence, or (what comes to the same thing), if he sues for trespass to the person, he must prove that the trespass was done negligently (n).

The origin of this exceptional rule as to highway accidents is rather obscure, but it seems to have sprung from two different sources. One was the principle that if cattle which are lawfully upon the highway stray on to neighbouring land without any negligence on the part of the person in control of them, there is no liability for trespass; the chief justification for putting cattle in this privileged position appears to be the practical hardship to their owners of adopting any other rule (o). The other was the view strongly developed by Lord Blackburn in *Fletcher v. Rylands* (1868) (p) and *River Wear Commissioners v. Adamson* (1877) (q), that a certain amount of risk is inevitable from traffic on the highway, and that persons who, or whose goods or land adjacent to the highway, are injured by such traffic cannot recover damages unless they can establish negligence. In neither of these cases, however, were the learned Judge's *dicta* essential to the decision of the Court.

So stood matters before the coming of the motor vehicle. Soon after its arrival on the highway the law had to consider how injuries arising from ordinary motor accidents were to be treated. At first there was a judicial tendency to regard such vehicles as something like wild beasts (r), and in 1909 it was only by a majority that the Court of Appeal declined to regard the mere fact that a motor omnibus had skidded as evidence either of negligence or of the omnibus being a nuisance (s). In 1923, McCardie, J., sitting in the Divisional Court in *Phillips v. Britannia Hygienic Laundry Co., Ltd.* (t), reduced motor cars to the level of mild cattle, and in what must perhaps be regarded as an *obiter dictum* laid down much the same principle as Lord Blackburn had done, but whether

(n) *Gayler & Pope, Ltd. v. Davies & Son, Ltd.*, [1924] 2 K. B. 75, 82—84.

(o) *Goodwyn v. Cheveley* (1859), 28 L. J. Ex. 298, 300—301; *Tillett v. Ward* (1882), 10 Q. B. D. 17; *post*, § 150 (3).

(p) L. R. 1 Ex. 265, 286—287.

(q) L. R. 2 App. Cas. 743, 767 (where the doctrine is formally stated).

(r) *Isaac Walton & Co. v. Vanguard Motorbus Co., Ltd.* (1908), 25 T. L. R. 13.

(s) *Wing v. London General Omnibus Co., Ltd.*, [1909] 2 K. B. 652.

(t) [1923] 1 K. B. 539, 552—553.

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he meant to apply the doctrine to actions for negligence for accidents on the highway, or to actions for trespass for accidents on the highway, or to both, or to neither, is doubtful. At any rate the Court of Appeal affirmed the decision on grounds which did not involve the principle at all (u).

However, in the next year *Gayler & Pope, Ltd. v. Davies & Son, Ltd.* (a), gave McCardie, J., an opportunity of definitely adopting Lord Blackburn's opinion as law. A pony and milk van belonging to the defendants were left unattended on the highway. The pony bolted and dashed into the plaintiffs' shop window and damaged a large quantity of goods in the shop. The defendants were sued for (a) negligence, or (b) trespass. The plaintiffs got judgment with respect to negligence because the bolting of a horse which has been left unattended in a public street is *prima facie* evidence of negligence on the part of the owner, who, in this case, could produce no facts to negative the presumption. Had the pony been in proper control and had nevertheless bolted, the defendants would not have been liable. As to trespass, they were held not liable. McCardie, J., examined the history of the law and said of Lord Blackburn's rule: "I venture to think that it is just and convenient and agreeable to modern notions and everyday life" (b). In the later case of *Winnipeg Electric Co. v. Geel* (c) the Judicial Committee took much the same view in an *obiter dictum*: "A plaintiff claiming damages for a personal injury in a running-down case would have to prove that he was injured, that his injury was due to the defendant's fault and the fact and extent of his loss and damage" (d).

Whether this special rule about accidents on the highway is a desirable one is a complicated question which cannot be discussed here (e). More relevant is the inquiry whether it extends to accidents occurring *anywhere*, and not merely on or from the highway. Perhaps a distinction should be drawn between (1) accidents occurring on a private road running across a man's land: e.g., a collision between A's motor car and B's milk float while both are lawfully using C's private drive leading to C's house; (2) accidents occurring on private

(u) [1923] 2 K. B. 832.

(a) [1924] 2 K. B. 75 (W. Cases, 172).

(b) [1924] 2 K. B. 82—84.

(c) [1932] A. C. 690.

(d) *Ibid.*, 695.

(e) 49 L. Q. R. 377—378.

land, but not on a road there : *e.g.*, A and B are both guests of C, and A negligently injures B, or B's racquet, while they are playing tennis on C's court. Is it necessary in either case for the injured party to prove negligence, or can he rely upon the action for trespass for personal injuries, or for trespass to chattels, leaving it to the defendant to justify his conduct if he can do so? As to (1), surely the rule laid down with respect to the highway ought to apply to a private road, for it is based on the principle that negligence must be proved because a certain amount of risk from traffic on the highway is inevitable and the same must be said of any private road commonly used for wheeled traffic. As to (2), however, these considerations do not apply and it is submitted that there is no need for the injured party to prove negligence. It is true that actions for inadvertent trespass for personal injuries occurring on private land are extremely uncommon if the law reports are any criterion. But that may well be explained in several ways. In the first place, we have pointed out at least three reasons why a plaintiff would often prefer to sue for the tort of negligence (*ante*, pp. 208—209). Secondly, many of the accidents which occur on private property may give rise to liability under what is known as the "rule in *Indermaur v. Dames*" (*f*), which subjects the occupier of premises to a duty more strict than that comprised in the tort of negligence. And thirdly, the comparatively recent creation of this last-mentioned rule in 1866 and its rapid development, and the enormous growth of negligence as a tort during the last hundred years, seem to have driven the action of trespass for personal injuries into the shade. It would be too much to say that lawyers have forgotten it, for there are distinguished practitioners and teachers who are quite alive to its possibilities (*g*). But the fact remains that the reports show little use of the action in legal strategy and even less in legal tactics.

§§ 63, 64.

§ 64. Assault and Battery.

Assault and
battery.

We have now to consider the various forms of trespass to the person. * The first of these are assault and battery.

(*f*) (1866), L. R. 1 C. P. 274; 2 C. P. 311; *post*, § 164.

(*g*) *E.g.*, Mr. Ralph Sutton, K.C., in the entertaining example which he gives in *Personal Actions at Common Law* (1929), 58—59.

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Battery is the intentional application of force to another person.

Assault is an act of the defendant which causes to the plaintiff reasonable apprehension of the infliction of a battery on him by the defendant.

In popular language the word "assault" is used to describe either or both of these torts and the tendency in legal text-books is to approve this practice (*h*). In this section "assault" will be used in its strict sense.

✓ We are probably safe nowadays in saying that battery must be "intentional", though, as was pointed out in the last section, in the earlier law a man might be held liable for even inadvertent battery (*i*).

The following are examples of the distinction between assault and battery. To throw water at a person is an assault; if any drops fall upon him it is a battery (*k*). So, too, riding a horse at a person is an assault; riding it against him is a battery. Pulling away a chair as a practical joke, from one who is about to sit on it is probably an assault until he reaches the floor, for while he is falling he reasonably expects that the withdrawal of the chair will result in harm to him. When he comes in contact with the floor, it is a battery. Throwing over a chair on which another person is actually sitting is either a battery or one of the forms of residuary trespass to the person; either way the defendant is liable (*l*).

Force.

Meaning of force.—It is not quite certain whether "force" in battery includes the flashing of light by a mirror in another person's eyes. It is said that the Queensland Criminal Code, 1899, correctly embodies the English Common Law in reckoning under "force" the infliction of light, heat, electricity, gas, odour or other things if applied in such a degree as to cause injury or personal discomfort (*m*). On principle this seems correct. Possibly, too, such injuries might be private nuisances, or intentional physical harm of the type in § 68,

(*h*) In law, the distinction may be vital: e.g., *Jones v. Sherwood*. [1942] 1 K. B. 127.

(*i*) *Contra*, Salmond, Torts, 382, note (*q*); but *Covell v. Laming* (1808). 1 Camp. 497, which is there cited, is not a modern case.

(*k*) *Pursell v. Horne* (1838), 3 N. & P. 564; and, as Sir Frederick Pollock noted (Torts, 171), there is much older authority in Reg. Brev. (ed. 1687), 108 b (*de liquore calido super aliquo projecto*).

(*l*) *Per* Gibbs, C.J., in *Hopper v. Reeve* (1817), 7 Taunt. 698, 700. Kissing a woman against her will is a battery: cf. Kenny, Criminal Law (15th ed 1936), 184, note 4.

(*m*) Russell, Crimes (9th ed. 1936), i, 573.

infra. At any rate it is certain that "force" does not require bodily contact with the aggressor; any implement like a stick, bullet, firework or other missile will do (n). Nor is physical hurt necessary. "The least touching of another in anger is a battery," said Holt, C.J., in 1704 (o), and in a later case in the same year he said laconically of spitting in a man's face, "it is a battery" (p). But mere passive obstruction does not constitute force. In *Innes v. Wylie*, the plaintiff's grievance was that he had been unlawfully prevented from entering club premises by a policeman, and Lord Denman, C.J., told the jury that there was no assault "if the policeman was entirely passive like a door or a wall put to prevent the plaintiff from entering the room" (q).

Meaning of act.—The "act" which is essential in assault Act. involves some bodily movement in the common sense of that term. Thus mere words are not an assault. *Meade's Case* (r), though it was actually concerned with an indictment for murder, contains a *dictum* which may be taken to apply to the law generally: "no words or singing are equivalent to an assault". Threats of personal violence which are purely oral and do not lead to injury in a man's business or freedom of contract are not actionable at all. But if he has just cause to fear that the threatener will do him bodily harm, he can apply to the justices of the peace for "surety of the peace", *i.e.*, binding over the accused to keep the peace (s). Words accompanying a menacing gesture may negative its appearance of being an assault, as where the defendant laid his hand upon his sword and said, "If it were not assize-time, I would not take such language from you"; as it was assize-time, he was held not to have committed an assault (t).

Pointing a loaded pistol at a person is, of course, an assault. But what if the pistol be unloaded? In the only civil case Pointing a
pistol.

(n) According to the American Restatement of Torts, § 18, it is battery if I daub with filth a towel which I hope that you will use, and you unwittingly use it and besoul your face. In English law this would appear to fall more naturally under intentional physical harm other than trespass to the person; *post*, § 68.

(o) *Cole v. Turner*, 6 Mod. 149. Cf. the Restatement of Torts, § 29, where mere touching without harm is not trespass to the person.

(p) *R. v. Cotesworth*, 6 Mod. 172.

(q) (1844), 1 C. & K. 257, 263. If the obstruction is unlawful, reasonable self-help may be used to overcome it.

(r) (1823), 1 Lewin 184.

(s) Stone's Justices' Manual, Part IV, tit. "Surety for good behaviour."

(t) *Tuberville v. Savage* (1669), 1 Mod. 3.

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on the question, *Blake v. Barnard* (1840), Lord Abinger, C.B., ruled that "If the pistol was not loaded it would be no assault" (*u*). In *R. v. St. George*, a criminal case of the same year, the actual question was whether the accused could be convicted of a particular form of statutory assault if the weapon were unloaded, but Parke, B., *obiter*, had no doubt that it would be a Common Law assault to point an unloaded weapon at a person at such a short distance that, if loaded, it might do injury (*a*). Principle and common sense favour this view. Assault involves reasonable apprehension of impact of something on one's body, and that is exactly what occurs when a fire-arm is pointed at one by an aggressor. It ought to be an assault whether it is loaded or unloaded, unless the person at whom it is levelled knows it to be unloaded, or unless his distance from the weapon was so great that any reasonable person would have believed that he was out of range (*b*).

Interception
of blow.

An assault will still have been committed even if the actual blow consequent upon it be intercepted or prevented by some third person. In *Stephens v. Myers* (*c*) the plaintiff was in the chair at a parish meeting. The defendant, who sat at the same table some six or seven places away from the plaintiff, became vociferous and by a large majority it was resolved that he be expelled. He said he would rather pull the plaintiff out of the chair than be ejected and he advanced with clenched fist upon the plaintiff, but he was stopped by the churchwarden who sat next but one to the plaintiff. He was held to be liable for assault. If, however, the plaintiff has no reasonable belief that the defendant has present ability to effect his purpose, it is presumably not an assault: *e.g.*, where A, who is in a train moving out of a station, shakes his fist at B who is on the platform.

(*u*) 9 C. & P. 626, 628. It has been said that the case "turned entirely on a point of pleading" (7 Camb. Law Journal, 67 *n*), but a study of the report shows that it was a point of pleading that was vital to the substance of the action.

(*a*) 9 C. & P. 483, 491—493. *R. v. James* (1844), 1 C. & K. 530, another criminal case on the same statute, is usually supposed to conflict with this, but Mr. J. W. C. Turner has shown that this is incorrect: 7 Camb. Law Journal, 63—67.

(*b*) Much the same view is expressed in Pollock, Torts, 171—172, and Salmond, Torts, § 88 (3), and it appears to be now the law in Scotland, New South Wales, Queensland and several American jurisdictions: Kenny, Criminal Law (15th ed. 1936), 177. It is adopted in the American Restatement of Torts, § 29.

(*c*) (1830), 4 C. & P. 349.

Some authorities make *fear* on the part of the plaintiff an ingredient in assault (*d*). If “fear” merely means “reasonable apprehension of force or harm”, this is correct, but if it means “alarm”, the decided cases do not support the view that the plaintiff must experience fear of this kind (*e*). No doubt in most circumstances there is alarm, but that is not essential. A courageous man might feel no alarm at an impending blow, but he is not to be penalised for being brave, and the defendant would still be liable. As to battery, there are examples of it in which the plaintiff has no opportunity of experiencing fear or any other sensation *before* the force is applied: *e.g.*, a blow from behind inflicted by an unseen assailant (*f*). Hence, it would seem that battery does not always include assault (*g*).

§§ 64, 65.

Does battery include assault?

§ 65. *Defences*.—The possible defences to assault and battery have been anticipated under “conditions which in general negative liability in tort” (*ante* §§ 11 *seq.*). One or two specific examples may be given here. It is not a battery to touch a person with no more force than is reasonable in order to call his attention to something. In *Coward v. Baddeley* (*h*), the defendant was trying to extinguish a fire in a house by playing upon it with a hose. The plaintiff, a bystander who thought the hose ought to be directed elsewhere, touched him on the shoulder in order to attract his attention. Thereupon the defendant gave him into custody. It was held that this was unjustifiable on the defendant’s part (*i*). So, too, where “the plaintiff with his elbow punched the defendant”, this “if done in earnest discourse, and not with intent of violence, is no assault” (*k*). It does not, however, follow that I am entitled to lay hands upon you to call your attention to any and every matter which I consider to deserve your notice, and I must take the risk of a Court holding my act to be merely officious. To rouse a person who is asleep

Defences.

(*d*) Pollock, Torts, 170; Addison, Torts, 158.

(*e*) For the like reason I have omitted the ambiguous word “threat” from the definitions. The American Restatement, Vol. 1, § 24, uses the word “apprehension”.

(*f*) A Biblical instance in point is the slaying of Sisera by Jael, the wife of Heber the Kenite. She drove a tent-peg through his head while he was asleep.

(*g*) *Contra*, Pollock, Torts, 171.

(*h*) (1859), 4 H. & N. 478.

(*i*) Martin, B., at p. 481, seemed to doubt whether the touching might not be tortious though he was certain that it was not criminal.

(*k*) *Turbernell v. Savadge* (1669), 2 Keble 545.

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in his cabin on a burning ship is of course no battery. To rouse a stranger who is quietly sleeping during a sermon in church probably is a battery, and perhaps the same may be said of rousing a student who is similarly overcome at a lecture, unless indeed it be the preacher or lecturer himself who does the awakening.

It is no justification of a battery that it was committed in order to assert a claim of social precedence, whether the claim be good or bad. In *Ashton v. Jennings* (l) the wife of one who was a justice of the peace and an esquire, thinking that she ought to have precedence of the wife of a doctor of divinity at a funeral, *molliter manus imposuit* on her to remove her. This was held to be a battery (m).

Assault and battery are crimes as well as torts, and the Offences against the Person Act, 1861 (n), makes criminal proceedings in certain circumstances a bar to any subsequent civil proceedings. By section 44, if the justices of the peace, upon the hearing of any case upon its merits, deem that the assault or battery is not proved or that it has been justified, or that it is so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall, if the accused applies for it, give him a certificate to that effect; and by section 45, if the accused shall have obtained such a certificate, or, having been convicted, shall have paid the whole amount adjudged to be paid, or shall have suffered the term of imprisonment awarded, he shall be released from all further proceedings, civil and criminal, for the same cause (o).

It is worth while noting that probably in no other branch of the law of tort, with the possible exception of trespass to land, is theory more qualified by common usage in daily life. Every day scores of trivial assaults and batteries are committed which never find their way into the Law Courts, owing to the rough common sense and humour of mankind. It is not so much *de minimis non curat lex* as *de minimis non agit sapiens*.

(l) (1674), 2 Lev. 133.

(m) The appropriate jurisdiction for settling such questions of precedence is apparently that of the Earl Marshal in the Court of Chivalry; but the Court has fallen into obsolence since 1732: *Laws of England* (Halsbury) (2nd ed. 1933), viii, § 1425.

(n) 24 & 25 Vict. c. 100.

(o) The cases on these sections are noted in *Stone's Justices' Manual* (1944), 425—426.

§ 66. False imprisonment. ?

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This is the infliction of bodily restraint which is not expressly or impliedly authorised by the law.

False imprisonment.

Both "false" and "imprisonment" are somewhat misleading terms. "False" does not here necessarily signify "mendacious" or "fallacious", but is used in the less common sense of "erroneous" or "wrong" (p). And it is quite possible to commit the tort without "imprisonment" of a person in the common acceptance of that term. In fact neither physical contact nor anything resembling a prison is necessary. If a lecturer locks his class in the lecture-room after the usual time for dismissal has arrived, that is false imprisonment; so, too, if a man be restrained from leaving his own house or any part of it (q), or be forcibly detained in the public streets (r). "Imprisonment", says the old *Termes de la Ley* (s), "is the restraint of a man's liberty whether it be in the open field, or in the stocks or cage in the street, or in a man's own house, as well as in the common gaol. And in all these places the party so restrained is said to be a prisoner, so long as he hath not his liberty freely to go at all times to all places whither he will, without bail or mainprize" (t).

This definition (with due elimination of the archaisms in it) was accepted by the Court of Appeal in *Meering v. Grahame-White Aviation Co., Ltd.* (1920) (u). It had been held in *Grainger v. Hill* (1838) (a) that imprisonment is possible even if the plaintiff were too ill to move in the absence of any restraint. In *Meering's Case* the Court went much farther by holding that the tort is committed even if the plaintiff did not know that he was being detained (b). The facts were

Knowledge of plaintiff.

(p) Salmond, *Torts*, p. 329, note (h).

(q) *Warner v. Riddiford* (1858), 4 C. B. (N.S.) 180.

(r) Blackstone, *Comm.*, iii, 127. Cf. the wedding guest detained by Coleridge's Ancient Mariner:

"He holds him with his glittering eye—
The wedding-guest stood still,
And listens like a three years' child,
The Mariner hath his will."

Would restraint by post-hypnotic suggestion suffice? There seems to be no reason why it should not be false imprisonment if the victim would not have assented to it.

(s) Its first edition was about 1520.

(t) A person bailed is theoretically in the custody of his sureties; a person mainprized (now wholly obsolete) is at large.

(u) 122 L. T. 44, 51, 53.

(a) 4 Bing. N. C. 212.

(b) *Contra* the American Restatement of *Torts*, §§ 35, 42.

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that the plaintiff, being suspected of stealing a keg of varnish from the defendants, his employers, was asked by two of their police to go with them to the company's office. He assented and at his suggestion they took a short cut there. On arrival he was taken or invited to go to the waiting-room, the two policemen remaining in the neighbourhood. In an action for false imprisonment the defence was that the plaintiff was perfectly free to go where he liked, that he knew it and that he did not desire to go away. But it was held by a majority of the Court of Appeal that the defendants were liable because the plaintiff from the moment that he came under the influence of the police was no longer a free man. *Atkin, L.J.*, said: "It appears to me that a person could be imprisoned without his knowing it. I think a person can be imprisoned while he is asleep, while he is in a state of drunkenness, while he is unconscious, and while he is a lunatic. . . . Of course the damages might be diminished and would be affected by the question whether he was conscious of it or not." The learned Lord Justice's ground for this opinion was that, although a person might not know he was imprisoned, his captors might be boasting elsewhere that he was (c). But this argument seems to be relevant rather to the tort of defamation, or injury to a man's reputation, than to false imprisonment, which is an injury to his person. Perhaps the actual decision in *Meering's Case* is justifiable on the ground that restraint of personal liberty is a very serious matter, but it would have been more satisfactory if the Court had been unanimous and if they had dealt with the earlier Court of Exchequer case, *Herring v. Boyle* (d), which was a decision the other way and which does not appear to have been even cited in *Meering's Case*.

Restraint
must be
complete.

✓ The tort is not committed unless motion be restrained in every direction. ✓ In *Bird v. Jones* (e) the defendants wrongfully enclosed part of the public footway on Hammersmith Bridge, put seats in it for the use of spectators of a regatta on the river, and charged for admission to the enclosure. The plaintiff insisted on passing along this part of the footpath, and climbed over the fence of the enclosure without paying

(c) 122 L. T. at pp. 53—54.

(d) (1834), 1 Cr. M. & R. 377 (boy wrongfully kept at school during holidays, but he was not cognisant of the restraint: held, no action lay).

(e) (1845), 7 Q. B. 742.

the charge. The defendants refused to let him go forward, but he was told that he might go back into the carriage way and cross to the other side of the bridge if he wished. He declined to do so and remained in the enclosure for half an hour. The defendants were held not to have committed false imprisonment.

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If a person has the means of escape, but does not know it, it is submitted that his detention is nevertheless false imprisonment unless any reasonable man would have realised that he had an available outlet. Thus if I pretend to turn the key of the door of a room in which you are and take away the key, it would seem unreasonable if you made no attempt to see whether the door were in fact locked. A more difficult case is that in which you have a duplicate key in your pocket but have forgotten its existence (f). It does not follow that a reasonable man never has a lapse of memory.

Means of escape.

Defences.—Here, as in assault and battery, most of the defences depend upon conditions which in general negative liability in tort (g). Some particular illustrations may be given.

Defences.

It is no tort to prevent a man from leaving your premises because he will not fulfil a reasonable condition subject to which he entered them. In *Robinson v. Balmain Ferry Co., Ltd.* (h), the plaintiff paid a penny for entry to the defendants' wharf from which he proposed to cross the river by one of the defendants' ferry-boats. A boat had just gone and, as there was not another one for twenty minutes, the plaintiff wished to leave the wharf and was directed to the turnstile which was its exit. There he refused to pay another penny which was chargeable for exit, as was stated on a notice-board, and the defendant declined to let him leave the wharf unless he did pay. The Judicial Committee held that this was not false imprisonment. "There is no law requiring the defendants to make the exit from their premises gratuitous to people who come there upon a definite contract which involves their leaving the wharf by another way. . . . The question whether the notice which was affixed to these

Reasonable condition.

(f) As was the case of Christian when he was imprisoned by Giant Despair in Doubting Castle.

(g) *Ante*, §§ 11 *seq.* It is beyond the scope of this book to consider war-time regulations and their interpretation: *e.g.*, *Liversidge v. Anderson*, [1942] A. C. 206.

(h) [1910] A. C. 295. Cf. 44 L. Q. R. 464—467.

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premises was brought home to the knowledge of the plaintiff is immaterial, because the notice itself is immaterial" (i). And the Court regarded the charge of a penny for exit as reasonable.

The House of Lords reached the same result on the ground of *volenti non fit injuria* in *Herd v. Weardale, etc., Co., Ltd.* (k), where a miner, in breach of his contract of employment with the defendants, refused to do certain work allotted to him in the mine, and demanded to be taken to the surface by the lift five hours before his shift expired. He was not allowed to leave for twenty minutes. The defendants were held not liable (l).

Reasonable
and honest
belief.

A common defence in connexion with arrest for a crime is "reasonable and honest belief" that the circumstances justified the arrest. It is for the Judge to decide this, and perhaps the best guide (though of necessity a rather vague one) is that laid down by Lord Campbell, C.J., in *Broughton v. Jackson* (m). "The defendant . . . must show reasonable grounds of suspicion for the satisfaction of the Court; it is not enough to state that he himself reasonably suspected. But he is not bound to set forth all the evidence; it is enough if he shows facts which would create a reasonable suspicion in the mind of a reasonable man." These conditions were not satisfied in *Hogg v. Ward* (n), where a police constable was held liable for arresting the plaintiff on a mistaken charge of felonious theft made by the owner of some harness, because the constable ought to have known from the plaintiff's open use of the property and his immediate statement of facts, which raised a reasonable inference that he had acquired it honestly, that arrest was not justifiable in the circumstances.

Arrest by
private
person.

The law confers much wider powers of arrest without a warrant upon a police officer (o) than upon a private person.

(i) [1910] A. C., at p. 299.

(k) [1915] A. C. 67 (W. Cases, 86).

(l) Similar questions would arise with a person getting on the wrong omnibus, discovering his mistake and not being allowed by the conductor to get off unless he pays the minimum fare; or with a student who mistakenly enters the wrong lecture-room and is not allowed by the lecturer to leave until the end of the hour on the ground that this will interrupt the discourse. In each of these cases the decision must, having regard to all the facts, turn upon whether (a) the mistake was a reasonable one, and (b) the condition as to exit was a reasonable one.

(m) (1852), 18 Q. B. 378, 385.

(n) (1858), 27 L. J. Ex. 443.

(o) *McArdle v. Egan* (1934), 150 L. T. 412.

A private person can arrest lawfully only if he can prove (i) that a felony had been committed, and (ii) that he had reasonable grounds for suspecting that the person arrested had committed *that* felony. The fact that he had very probably committed the same felony with respect to property other than that for which the private person arrested him will not justify the arrestor (p). As to the powers of a private person to effect an arrest, apart from this particular instance, they are so intricate (q) that a distinguished writer described them as "most unsatisfactory and almost a snare" (r). This is the more unfortunate, as in certain cases (where a treason, felony, or dangerous wounding is committed in his presence) a private person not only *may*, but *must*, arrest the offender, or at least try his best to do so. As he probably has not the faintest idea of what constitutes a felony, he may have to take his choice between the risks of punishment by a criminal Court if he fails in his duty and of being cast in heavy damages for false imprisonment if he makes a mistake as to his right. The rules adopted in the American Restatement of the Law of Torts (s) are nearly as complicated as those in our law. Both systems did right in grading crimes according to their gravity, so far as the criminal is concerned. Both made a cardinal blunder in making this gradation a determinant not merely of the extent of the liability of the criminal, but also of the liability of an innocent third person in a collateral matter like arrest of the offender.

The law is even more complicated as to a police officer's powers (t). Very broadly, he cannot arrest for a misdemeanour without a warrant (u). To this there are many statutory exceptions. Where there is such an exception, the Courts have in some cases taken the strong course of holding the constable exempt from liability for false imprisonment if, though the person arrested has not in fact committed the offence, the constable honestly and on reasonable grounds believes that he has committed it; nor is it material that the statute apparently permits such arrest only if the person is

Arrest by
police.

(p) *Walters v. W. H. Smith & Son, Ltd.*, [1914] 1 K. B. 595.

(q) They are summarised in Kenny, *Criminal Law* (15th ed. 1936), 528—529.

(r) The late C. S. Greaves, Q.C., cited *ibid.*, 531.

(s) Vol. 1, §§ 112—145.

(t) Kenny, *op. cit.* 529—531.

(u) See *Dumbell v. Roberts*, [1944] 1 A. E. R. 326.

§ 66. , actually committing the offence; examples are the arrest of a person who appears to be drunk while in charge of a motor vehicle (a), or of a woman who appears to be importuning men for the purposes of prostitution (b). In such cases there is a conflict of interests between the private persons whose liberty ought to be respected and the public whose safety and good order ought to be preserved by immediate interference with the supposed offender (c). In recent times some judicial attempts have been made to state tests for resolving this conflict (d), but still more recently the House of Lords in *Barnard v. Gorman* (e) declined to lay down any principle more exact than that each statute must be construed on its merits, and, on the facts before them, there was no need to go beyond that. But the law as it now stands certainly casts a heavy responsibility on a constable who may have to decide at a moment's notice a point that has puzzled the Appellate Courts several times. The only remedy seems to be legislation stating definitely for what statutory misdemeanours a constable may arrest upon suspicion without a warrant.

Information
of charge.

Where a policeman arrests a person, X, on reasonable suspicion of any crime for the arrest of which the law does not require a warrant, the general principles as to informing X of the ground on which he is arrested may be summarised as follows (and they apply also to arrest by a private person). X must, in ordinary circumstances, be informed of the true ground of his arrest. The policeman is not entitled to be silent as to the reason for the arrest or to give a reason which is not true. If he does either of these things he is guilty of false imprisonment, but this is subject to exceptions the range of which is not entirely settled, but which certainly include the following. X need not be informed of the reason for his arrest if the circumstances are such that he must be aware of the general nature of the alleged offence for which he is seized; nor can he legally complain if it was practically impossible to give

(a) *Trebeck v. Croudace*, [1918] 1 K. B. 158.

(b) *Isaacs v. Keech*, [1925] 2 K. B. 354. But see Lord Wright in *Barnard v. Gorman*, [1941] A. C. 378, 394. Cf. *Ledwith v. Roberts*, [1937] 1 K. B. 232.

(c) [1925] 2 K. B. at p. 360.

(d) *E.g.*, the offence must be of grave danger to the public and difficult to substantiate except by an arrest in the first instance: [1918] 1 K. B. at p. 164.

(e) [1941] A. C. 378.

him the information owing to his own fault; e.g., if he made an immediate counter-attack on the policeman or if he ran away. In any event, the policeman need not state the reason for the arrest in technical or precise language, provided he conveys to X the substance of the charge against him. These principles were laid down by Viscount Simon in *Christie v. Leachinsky* (f) and were expressly or tacitly approved by the other noble and learned Lords. In that case, the police arrested X without a warrant for an alleged misdemeanour under the mistaken impression that a statute authorised them to do so, and, when sued by X for false imprisonment, they pleaded that, at any rate, they had reasonable grounds for suspecting that X had also committed the felony of larceny. The plea was held bad, because they had not informed X of the charge of larceny.

Remedies.—They are (i) self-help; (ii) *habeas corpus*; Remedies (iii) action for damages. No one who is unlawfully restrained need wait until he is released before seeking redress. He can use self-help in order to escape, on the principles stated in § 34, *ante*. And he, or any one on his behalf, can apply for a writ of *habeas corpus* to secure his release.

Distinction from malicious prosecution.—False imprisonment must be sharply distinguished from the tort of malicious prosecution. The latter will be more fully discussed in a later chapter (g). Here it is enough to note that the plaintiff in an action for it must prove that the defendant (i) instituted a prosecution of him which (ii) ended in the plaintiff's favour and (iii) was instituted without reasonable or probable cause, and (iv) was malicious. Compare this with the much lighter burden of proof in an action for false imprisonment. All that the plaintiff need prove is the restraint by the defendant. He need not prove that it was unlawful. The burden of proof is on the defendant to show that it was lawful.

The special relevance of the difference comes out in this way. Every one who is connected with directing the unlawful restraint of another person is liable for false imprisonment, but this is subject to a distinction between merely ministerial acts and discretionary acts. The oft-cited example of this is where, before a magistrate, A makes a charge against B, whereupon the magistrate orders that B be taken into custody and detained until the matter can be investigated. Here A

(f) [1947] A. C. 573, 587—588.

(g) *Post*, § 171.

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has set in motion, not a ministerial officer, but a judicial one who exercises a discretion as to making the arrest (*h*). A is therefore not liable to an action for false imprisonment, although he may have taken one step towards making himself liable for malicious prosecution. In *Austin v. Dowling* (*i*), where an inspector of police refused to take the responsibility of arresting B on a charge made by A, unless A signed the charge-sheet, it was held that A's tort was false imprisonment, because the inspector had interposed no discretion of his own between A's charge and the arrest which followed (*j*).

Residuary
trespasses to
the person.

§ 67. Residuary trespasses to the person (*k*).

Trespasses to the person which never acquired specific names are very sparsely illustrated in the reports (*l*). During the last ninety years there have been only four actions of this kind, and of those only one was successful, *Sadler v. South Staffs, etc., Tramways Co.* (1889) (*m*). Several reasons may be suggested for this. In the first place, the nominate trespasses of assault, battery, false imprisonment and some forms of what may be called "interference with family relations" covered the ground so well in the older law that there was almost nothing left that could be called a "residuary form of trespass", especially when it is recollected that in the nominate torts of this sort it was at that time no defence for a man to say that he had acted inadvertently and not intentionally. Moreover, many intentional or inadvertent injuries to the person or to property that fell outside "trespass to the person" or "trespass to property" were caught by an action upon the case for trespass or by an action upon the case

(*h*) *Austin v. Dowling* (1870), L. R. 5 C P. 534, 540.

(*i*) *Ibid.*

(*j*) Note that mere signature of the charge-sheet will not make the signer responsible for an arrest already made by some one else: *Sewell v. National Telephone Co. Ltd.*, [1907] 1 K. B. 557, 560.

(*k*) 49 L. Q. R. (1933), 360—362, 364 *et seq.*

(*l*) There is only one genuine instance (No. 53) in the 442 cases of "Trespass" in Brooke's Abridgement (1573) and the period following the Year Books is almost as meagre in reported cases. They are *Underwood v. Hewson* (1723), Stra. 596; *Scott v. Shepherd* (1773), 2 W. Bl. 892; *Leame v. Bray* (1803), 3 East 393; *Hopper v. Reeve* (1817), 7 Taunt. 698; 1 Moore C. P. 407; *Hall v. Fearnley* (1842), 3 Q. B. 919; *M'Laughlin v. Pryor* (1842), 4 M. & G. 48, 56; *Holmes v. Mather* (1875), L. R. 10 Ex. 261; *Sadler v. South Staffs, etc. Tramways Co.* (1889), 23 Q. B. D. 17; *Stanley v. Powell*, [1891] 1 Q. B. 86; *Gayler & Pope, Ltd. v. Davies & Son, Ltd.*, [1924] 2 K. B. 75. All these cases are considered in 49 L. Q. R., cited last note.

(*m*) (1889), 23 Q. B. D. 17.

simply (n). Good particular examples of these were some of the injuries committed through the agency of animals, although they might also be treated as trespasses pure and simple (o). All this was before the action upon the case for negligence had ripened into the tort of negligence. When it had become established, it thrust into the background trespass for *unintentional* injuries to the person or chattels of another. It was shown in § 63, *ante*, how this came about, and there is no need to repeat it here.

As has been said, *Sadler v. South Staffs, etc. Tramways Co.* (1889), is the only modern instance of a successful action for this kind of trespass to the person. The defendants were a company authorised by Parliament to run tramcars by steam, and they had running powers over the line of another tramway company. Certain points on this other line were defective, and in consequence of this the defendants' tramcar left the rails and injured the plaintiff, who was on the highway. The jury negatived negligence on the part of the defendants, found that the accident was due to the defective points, and awarded damages to the plaintiff. The Court of Appeal, affirming the decision of the Court below, held that the defendants were liable because their statutory powers did not authorise them to run their trams on a line which was defective.

This case gave some trouble to the Divisional Court in *Phillips v. Britannia Hygienic Laundry, Ltd.* (p), where McCardic, J., was evidently preparing the foundation of the doctrine (which he laid down as law in a later decision) (q) that an action for trespass to the person on the highway will not lie unless at least negligence be proved (r). He said of *Sadler's Case*, "It is not easy to discover the ratio of the judgments. . . . It seems to have been clear and admitted that the defendants could have detected the defect by inspection. They failed to do so and hence the accident. The decision was given, I think, upon the special effects of the Tramways Acts, and the duty thereby cast on the defendants. . . . *Sadler's Case* must rest either on negligence

(n) Viner, *Abridgement* (2nd ed.), ii, 1—6.

(o) *Ibid.*, i, 233—236.

(p) [1923] 1 K. B. 539.

(q) *Gayler & Pope, Ltd. v. Davies & Son, Ltd.*, [1924] 2 K. B. 75.

(r) *Ante*, p. 209.

§§ 67, 68. or on the obvious and avoidable breach of a particular statutory duty. It seems to me to be, so far as I follow it, *sui generis*" (s).

Where an action for trespass to the person is maintainable, it seems, as was stated on an earlier page, that it is no defence to say that the harm was inflicted negligently and not intentionally (t).

Physical
harm other
than tres-
passes to the
person.

§ 68. Intentional physical harm other than trespasses to the person.

An act wilfully done which is calculated to cause, and actually does cause, physical harm to another person is a tort although it may not, according to current practice, be treated either as a trespass to the person or as any other specific tort.

A modern
principle.

This statement of principle is quite modern and its limits have not been explored in the law Courts. It was laid down by Wright, J., in *Wilkinson v. Downton* (u), where A, by way of practical joke, falsely told the plaintiff, a married woman, that her husband had met with an accident whereby both his legs were broken. She believed this and was so violently upset by the consequent nervous shock that she had a serious illness. A was held liable. Some attempt was made by counsel to base the claim on deceit as a tort, but the learned Judge indicated that this would have been an extension of that tort, presumably because it is necessary that there the injured party should be intended to act upon the false statement and should have acted upon it, and here the plaintiff could scarcely be said to have acted in any way. Wright, J., preferred the following ground: "The defendant has . . . wilfully done an act calculated to cause harm to the plaintiff—that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action there being no justification alleged for the act" (a).

(s) [1923] 1 K. B. at pp. 554—555. Bailhache, J., took much the same view (pp. 555—556). Both Judges pointed out that apart from statute, a tramway company has no right to cut up the highway at all. Another possible explanation of *Sadler's Case* is that the defendants were not making an ordinary use of the highway, but were engaged in a dangerous operation there, in running a tram on a defective rail. Certainly that was Lord Esher's opinion in the case. The principle is much the same as that relating to the conduct of dangerous operations, expressed by Talbot, J., in *Brooke v. Bool*, [1928] 2 K. B. 578, 587 (*post*, § 166).

(t) *Ante*, p. 207.

(a) [1897] 2 Q. B. at pp. 58—59.

(u) [1897] 2 Q. B. 57 (W. Cases, 88).

Since *Wilkinson v. Downton* no other example of the principle in that case has appeared in the English reports, except *Janvier v. Sweeney* (b), in which on similar facts *Wilkinson's Case* was approved by the Court of Appeal. This may be due to the fact that the harm in both cases took the form of nervous shock and, as has been pointed out (*ante*, pp. 77—78), it is still uncertain whether nervous shock is to be regarded as a tort in itself or (as seems to be the better view) merely as a possible consequence of a tortious act. At any rate, there is no ground for thinking that the principle in *Wilkinson v. Downton* is inapplicable unless the harm is nervous shock. That is too narrow a view. If the plaintiff, when she heard the news, had broken her arm in falling in a faint, the defendant would have been equally liable; or, if I suddenly shout at a child who is crossing an unfenced plank over a stream and the child, as I intend, loses its balance and gets a ducking, surely I am just as much liable as if it had sustained illness from a nervous shock. Nor need the principle be limited to harm arising from a *statement*, e.g., if I scare a person into a nervous shock by dressing up as a ghost. Again, the administration of a noxious drug to an unwitting victim may be another illustration of this tort, although, as was noted in an earlier section, it would not be the tort of battery (c) (if accompanied by false representations, it might also be the tort of deceit). Under the old practice, it might have been trespass to the person if the harm were direct, or trespass upon the case if it were reckoned as consequential. Nor is there any reason to suppose that such harm would not be actionable at the present day. In current pleading the remedy would be styled simply “an action for personal injuries”, thus avoiding the embarrassment of deciding whether it were trespass or case (d). And Wright, J.’s principle would give it neat expression on the side of substantive law as distinct from its procedural aspect.

The principle would also extend to the intentional infection of another person with disease (inadvertent infection is probably the tort of negligence (e)). If the disease is a

(b) [1919] 2 K. B. 316. *Dulieu v. White*, [1901] 2 K. B. 669, and *Hambrook v. Stokes*, [1925] 1 K. B. 141, were cases of nervous shock resulting from the tort of negligence.

(c) *Ante*, § 13.

(d) As in *Scott v. Shepherd* (1773), 2 W. Bl. 892.

(e) Clerk & Lindsell, *Torts*, 366—369.

§ 68.

venereal one contracted from cohabitation, the position is doubtful, although, as has been pointed out, it is hard to see why fraudulent concealment by the person suffering from the disease should not negative the victim's consent to cohabitation and thus make the infection a tortious battery (f). But the Courts are not likely to entertain civil litigation on the question, for the plaintiff would be in this dilemma: if the parties were husband and wife, the action would not be maintainable at all, and if they were not husband and wife, the defendant would probably plead successfully *ex turpi causa non oritur actio* (g).

(f) *Ante*, § 13.

(g) *Hegarty v. Shine* (1878), 14 Cox C. C. 145.

CHAPTER X

INJURIES AFFECTING FAMILY RELATIONSHIPS

§ 69. This part of the law of tort is rather ragged in form and, at any rate in its relation to the seduction of children, unjust in substance (a). A certain amount of dead timber must be marked out and hewn away in order to state the current rules intelligibly and even then they are still tinged with the archaic idea that those who interfere with a man's rights over his wife or child are meddling with more or less valuable servants of his rather than outraging his domestic feelings. §§ 69, 70.

Wrongs to family relationships may conveniently be divided into those affecting (i) the husband's rights in respect of his wife and *vice versa*, and (ii) the parent's right in respect of his or her child.

§ 70. Wrongs to the husband's rights in respect of his wife and *vice versa*. Husband and wife.

(1) *Enticing away a spouse*.—In *Winsmore v. Greenbank* (1745) (b) the Court of Common Pleas, quite undisturbed by the novelty of the remedy, allowed an action upon the case by a husband against the defendant for enticing away his wife so that the plaintiff "lost the comfort and society of his said wife". They held that there must be *damnum cum injuria* and they found that the *damnum* consisted in the loss of *consortium*. This makes anything like carnal connexion between the enticer and the wife unnecessary. Indeed, the action would lie against a woman who procured the wife to leave her husband just as much as against a man. Against an adulterer there is, as we shall see, another remedy, but proof of adultery is no more an essential to success in an action for enticement (c) than it is sufficient by itself to establish enticement (d). What is necessary and sufficient is that there must be a cessation of cohabitation and *consortium*. Adultery (1) Enticement.

(a) I have suggested what ought to be its basis in 17 New York University L. Q. R. (1939), 16—20.

(b) Willes 577.

(c) *Elliott v. Albert*, [1934] 1 K. B. 650, 662.

(d) *Newton v. Hardy* (1933), 149 L. T. 165.

§ 70.

is of course relevant in divorce proceedings, and if, after a husband has recovered damages in an action for enticement, he goes on to file a petition for divorce on the ground of adultery, he cannot recover further damages against the enticer (who now becomes the co-respondent) unless some grave matter for consideration has not been dealt with in the enticement action (*e*). Even if there be no enticement, there is ground for thinking that mere harbouring of a wife after her husband's request for delivering up of her is, in the absence of lawful excuse (*infra*), tortious (*f*).

Winsmore v. Greenbank was followed by the Court of Appeal in *Place v. Searle* (*g*), where the defendant had been on terms of intimacy with the plaintiff's wife for six years, although there was no allegation of impropriety. One evening the defendant, after a fight between himself and the plaintiff which followed upon a quarrel between plaintiff and his wife, said to the wife "Come on Gwen. We will go", and they departed accordingly from the plaintiff's house. McCardie, J., dismissed the action. The Court of Appeal reversed his decision and ordered a new trial on the ground that McCardie, J., was wrong (i) in placing the whole evidence of enticement on the six words, "Come on Gwen. We will go", instead of taking also into account all that had gone on during the preceding six years; (ii) in holding that, in order to succeed in such an action, the husband must prove that the will of the wife was overborne by the stronger will of the defendant (*h*).

Blackstone (*i*), in speaking of this tort, says, "The old law was so strict in this point, that, if one's wife missed her way upon the road, it was not lawful for another man to take her into his house, unless she was benighted and in danger of being lost or drowned: but a stranger might carry her behind him on horseback to market, to a justice of the peace for a warrant against her husband, or to the spiritual court to sue for a divorce". This does not leave much scope for the energies

(*e*) *Menon v. Menon*, [1936] P. 200.

(*f*) Inference from *Winsmore v. Greenbank* (1745), Willes 577, 582; *Philp v. Squire* (1791), Peake 114; *Berthon v. Cartwright* (1796), 2 Esp. 480. In *Place v. Searle*, [1932] 2 K. B. 497, 517, Greer, L.J.'s amendment of *Lush, Husband and Wife*, is not really a denial of the existence of this remedy, but merely a harmonising of the later part of a paragraph with the earlier: cf. Scrutton, L.J., at p. 513.

(*g*) [1932] 2 K. B. 497 (W. Cases, 90).

(*h*) The case was re-tried *at nisi prius* and the husband got a verdict for substantial damages.

(*i*) Comm. iii, 139.

of a knight-errant whose quest is the relief of distressed wives. But Willes, L.C.J., in *Winsmore v. Greenbank* (k) hinted at something wider when he said that if the husband had lost his wife's *consortium* by a lawful act on the defendant's part, no action could be maintained; and later rulings at *nisi prius* (l) and *dicta* in the Court of Appeal in *Place v. Searle* (m) show that reception of the wife on grounds of humanity, e.g., to protect her against the husband's brutality, does not constitute enticement; and it may be that this is so even where the defendant has acted simply upon the wife's representation of her husband's cruelty without procuring proof of it (n). And even where there is no evidence of unkindness on the husband's part, yet if the wife asks the defendant's advice which he gives in good faith, he is not liable. But if the advice were volunteered—much more if it amounted to persuasion—that is no defence (o).

After some doubts expressed in earlier cases (p), it was held in *Gray v. Gee* (1929) (q) that a wife can also maintain the action for enticement against any one who persuades her husband to leave her. Adultery is no more essential to the cause of action here than it is in enticement of a wife; it is a mere circumstance that may go to prove enticement which may quite possibly be established without it (r). In the United States it had long been recognised that the wife could sue (s). In England, the sluggishness of the Courts in allowing the action seems to have been due partly to the idea that although the wife is under the protection of the husband, yet he is not under her protection, partly to the procedural difficulty that, until the Married Women's Property Act, 1882, the wife could not sue without joining her husband. It is submitted, although there is no decision to that effect, that

(k) (1745), Willes, at p. 581.

(l) *Philp v. Squire* (1791), Peake 114; *Berthon v. Cartwright* (1796), 2 Esp. 480.

(m) [1932] 2 K. B. at pp. 513—514, 517—518.

(n) *Philp v. Squire*, *supra*.

(o) *Smith v. Kaye* (1904), 20 T. L. R. 261.

(p) *Lynch v. Knight* (1861), 9 H. L. C. 577; *Butterworth v. Butterworth*, [1920] P. 126, 130—131.

(q) 39 T. L. R. 429. So, too, *Place v. Searle*, [1932] 2 K. B. at pp. 512, 521; *Newton v. Hardy* (1933), 149 L. T. 165 (where, however, there was no sufficient evidence of enticement).

(r) *Elliott v. Albert*, [1934] 1 K. B. 650, 662.

(s) See Restatement of Torts, §§ 683, 690. The States vary in their recognition of an action for "alienation of the affections" of either spouse by a third party.

§ 70.

Writ of
ravishment.

mere harbouring of a husband is just as tortious as harbouring of a wife (t).

The obsolete writ of ravishment.—An action which appears to be obsolete now but which deserves a brief historical note is one described by Blackstone (u) as “writ of ravishment, or action of trespass *vi et armis, de uxore rapta et abducta*”. He says that it lay at Common Law, that thereby the husband recovered, not possession of his wife, but damages against the third party for taking her away, that by the Statute of Westminster I (8 Edw. 1, c. 13) the offender should also be imprisoned for two years and fined at the pleasure of the King, and that both the King and the husband might have the action (a).

The action fell into desuetude in the early nineteenth century (b). Perhaps the more convenient remedy for enticement invented in *Winsmore v. Greenbank* (c) thrust it into the shade, for there the action was upon the case and not for trespass and it required no allegation of the precise means used to get the wife away.

(2) Adultery
with wife.

(2) *Adultery with the wife.*—An action of trespass *vi et armis* (d), also called an action for “criminal conversation”,

(t) *Ante*, p. 230. See Scrutton, L.J., in *Place v. Searle*, [1932] 2 K. B. at p. 512, and Swift, J., in *Newton v. Hardy* (1933), 149 L. T. at p. 166.

(u) Comm. iii, 139.

(a) At first sight the authorities look rather confused as to the foundation of this action. The apparent confusion is due to Fitzherbert's *Natura Brevium*. At 89 O, he gives the writ as one of trespass based upon the Statute of Westminster. At 52 K, he says that the husband “may have an action at common law, *de uxore abducta cum bonis viri*, or an action of trespass for taking the wife”. Coke, 2 Inst. 434, says that this same action lay at Common Law and that the wrong at which it is aimed is also prohibited by the Statute, where a punishment additional to that at Common Law was inflicted. From what he adds it is evident that a writ could be brought at Common Law, omitting “*contra formam statuti*”. *Walker v. Rich* (1665), Bacou, Abr. (ed. 1832), Marriage and Divorce (F) 2 shows that so long as the plaintiff did not recite any particular statute, but merely concluded *contra formam statuti*, it did not hurt him even though his action were at Common Law.

Whether Fitzherbert, Coke and Blackstone were correct in thinking that the writ existed before the Statute of Westminster is unknown, and is a question of purely antiquarian interest, for the action faded away after *Walker v. Rich*.

(b) Bac. Abr. (last note) speaks as if it were still in existence, but a note in Chitty's ed. of Blackstone's Commentaries states that it is obsolete. Modern books omit any reference to it, except Pollock, Torts, 181, note. On the statutory side it was wiped out by 9 Geo. 4, c. 31 (Offences against the Person Act, 1828), which repealed 3 Edw. 1, c. 13, and 13 Edw. 1, st. 1, c. 34 (so far as the latter related to rape).

(c) (1745), Willes 577.

(d) Some thought that it was action upon the case, not trespass: *Macfadzen v. Olivant* (1805), 6 East 387.

could be used by the husband against one who committed adultery with his wife (e). True, the wife had consented to the intercourse, but for the purposes of this action she was presumed to be incapable of giving such consent (f). When the Divorce Court was established in 1857, the action of criminal conversation was abolished, but the claim for damages against the co-respondent in a petition for divorce rests upon a similar foundation.

(3) *Injury which deprives husband of wife's consortium.*—An action of trespass can be brought by the husband against any person who so injures his wife as to deprive the husband of her *consortium* (i.e., her society and service). Blackstone (g) says that the beating or other maltreatment must be “very enormous”, but it must not be hastily inferred from this that nothing but assault and battery will suffice to deprive the husband of the *consortium*. Blackstone had in mind some old cases where the wrong did take the form of these torts (h). But *Brockbank v. Whitehaven Ry.* (i) shows that the action extends to loss of *consortium* arising from injuries in a railway collision. Loss of services was also alleged there, but there is nothing to show that such an allegation was essential. It must be noted that this action is quite distinct from that which the husband might sue at Common Law on behalf of his wife or which, since the Married Women's Property Act, 1882, she can sue on her own account for the injury done to her. The same wrongful act may deprive her husband of her *consortium* and do bodily harm to her. And there are two separate remedies for these two separate torts. In cases like *Brockbank v. Whitehaven Ry.* the wife can nowadays maintain an action on her own behalf. Before 1883 the law was the same except that her husband must sue for her benefit, and this action which he brought merely as her representative was entirely independent of the action which he had, and still has, for the loss of *consortium*.

(3) Deprivation of wife's *consortium*.

(e) Blackstone, Comm. iii, 139—140.

(f) Holdsworth, H. E. L. viii, 430.

(g) Comm. iii, 140.

(h) *Guy v. Livesey* (1618), Cro. Jac. 501; *Hyde v. Scysson* (1619), Cro. Jac. 538.

(i) (1862), 7 H. & N. 834.

§ 71.

Wrongs to
parental
rights.

(1) Obsolete
action as to
heir.

§ 71. Wrongs to parents' rights in respect of their children.

(1) *Obsolete action for taking away heir.*—Fitzherbert said that "a man shall have an action of trespass for taking his son and heir, or his daughter and heir, and marrying her" (k). Whether this extended to a child who was not an heir was an open point in the time of Elizabeth. In *Barham v. Dennis* (1600) (l), three Judges were of opinion that it did not, and there was sound reason in this if the only ground of the action was the loss to the father of the heir's marriage which in those days had a pecuniary value. The dissenting Judge held that the remedy applied in respect of any child, whether heir or not; he took the broader view that a father has an interest in the education and provision of all his children. Nothing more definite than an adjournment is reported. Blackstone (m) repeated the doubt, citing this case. In *Hall v. Hollander*, Holroyd, J., said *obiter* that the action will not lie "except for taking a son and heir" and that for other children loss of service must be proved (n). Probably the action is now obsolete. It has not been expressly abolished; but if its foundation were the feudal one of loss of the child's marriage, one may urge that *cessante ratione legis, cessat lex ipsa*, though it must be confessed that the older authorities disagreed as to what its basis was. At any rate, modern text-books, on balance, seem to regard it as extinct (o), and perhaps a practitioner would nowadays advise the parent to rest content with two other remedies which undoubtedly exist for recovering a child from one who takes him away: (i) writ of *habeas corpus*; (ii) petition to the Court of Chancery (p). It should also be added that if any injury is done to the child

(k) *Natura Brevium*, 90 H.

(l) Cro. Eliz. 770. For other cases, see Viner, *Abr.*, Trespass (L. 4); vol. xx, 451; and *Father and Son* (A); vol. xiii, 139. In *Hunt v. Wotton* (1678), T. Raym. 259, the father recovered damages for injury to the child (fracture of thigh-bone) although the action was not laid *per quod servitium amisit*. This was contrary to the earlier decision in *Gray v. Jefferies* (1587). Cro. Eliz. 55, that the remedy did not lie for mere blows (as distinct from kidnapping) which caused loss of the marriage.

(m) Comm. iii, 140—141.

(n) (1825), 4 B. & C. 660, 662.

(o) Salmond, *Torts*, § 93 (1), is of this opinion. Clerk & Lindsell, *Torts*, 315 *seq.*, and 17 *Laws of England* (Halsbury) (2nd ed.), § 1378, make no mention of it. See, too, Holdsworth, *Hist. of Eng. Law*, viii, 427—428. Pollock, *Torts*, 180—181, mentions the action but does not expressly state that it has disappeared.

(p) Eversley, *Domestic Relations* (5th ed., 1937), 418—421; Salmond, *Torts*, § 93 (1).

itself, damages are of course recoverable by the child itself, the action being brought by its next friend. This will not compensate the parent for the deprivation of the child, but it is a reminder to those who kidnap that they expose themselves to at least one action for damages.

(2) *Deprivation of child's services.*—It is a tort to do any act to a child which wrongfully deprives the parent of its services (q). § 71.
(2) Deprivation of child's services.

Our law here displays an unfortunate and vicious historical twist. The ground on which any remedy of this kind ought to be based is outrage or injury to the parent as head of a family. But in fact the action *per quod servitium amisit*, which began as a remedy for a master against one who interfered with his servant so as to deprive him of his services, was extended by 1653 (r) to similar interference with a child. The tort is in form therefore merely a species of the more general tort of interfering with the relations of master and servant, which is considered in a later chapter (s). The law thus made a false start by holding that the remedy must depend not on the question, "Have the family rights of the parent been injured?" but on the question, "Has the parent lost the services of the child?" Upon the whole the Courts have done their best to reduce the requirement of "service" to something very like a fiction and have also indirectly taken account of the real wrong which is inflicted, by encouraging juries to give exemplary damages against a defendant in cases of seduction; and they have done this not only where the plaintiff is a parent, but also where he or she stands merely *in loco parentis* (e.g., an aunt) or has adopted the child (t),

(q) American law here has a wider range than English law: Restatement of Torts, §§ 699—707.

(r) *Norton v. Jason*, Style 398. I cannot trace the extension farther back than this in Ashe's Promptuarie (1614; the only tolerably efficient index to the black-letter Year Books) under the titles "Action upon the Case", "Enfant", "Trespass", or in the authorities cited in *Postlethwaite v. Parkes* (1766), 3 Burr. 1878, or in Rolle's Abridgment. Cf. Holdsworth, *Hist. of Eng. Law*, viii, 427—430.

(s) *Post*, § 169. The paradox is that the action for depriving a master of his employee's services is much commoner in its fictional application to seduction of children than in its use as a remedy for interfering with servants *stricto sensu*: *Att.-Gen. v. Valle-Jones*, [1935] 2 K. B. 209, 216.

(t) *Irwin v. Dearman* (1809), 11 East, 23, where Lord Ellenborough, C.J., admitted that the practice of awarding exemplary damages was illogical, but said that it had become inveterate. Cf. *Howard v. Crowther* (1841), 8 M. & W. 601. For other circumstances which may aggravate damages, see *Elliott v. Nicklin* (1818), 5 Price 641. As to an adopted child, see *Peters v. Jones*, [1914] 2 K. B. 781.

§ 71.

or where the child is illegitimate (u). Moreover, the idea of service makes the age of the child irrelevant in the sense that, provided loss of service is proved, it is immaterial whether the child is or is not of full age (a). But for all that the law is inelegant in form and sometimes morally unjust in substance. It will not help a parent if the child is too young to be capable of rendering service, and where the injury takes the shape of seduction, "the quasi fiction of *servitium amisit* affords protection to the rich man, whose daughter occasionally makes his tea, but leaves without redress the poor man whose child . . . is sent, unprotected, to earn her bread among strangers" (b).

The tort is sometimes referred to as "seduction", but this is apt to be misleading; for, although seduction is a common mode of committing it, any other mode will suffice, provided there is a loss of service, *e.g.*, assault and battery of a son (c), or negligently injuring him in a highway collision (d); moreover, as will be seen shortly, even where there is carnal knowledge of a daughter, that, by itself, will not suffice to make the defendant liable.

Proof of service.—Very little evidence of this is needed, either as to the obligation to render the service or as to the particular acts in which it consists. If the child is under age (twenty-one years) the mere fact that it lives in its father's household is enough to imply the fact of service (e). But where the child is too young to be capable of rendering it (*e.g.*, two and a half years in age) the action will not lie (f). If the child be of full age, then there must be proof of actual service to the parent, although it may be very slight; provided that be established, it is immaterial whether or not there was a contractual obligation to render such service (g). Where the child is under twenty-one, even a mere right to the service

(u) *Bectham v. James*, [1937] 1 K. B. 527.

(a) *Bennett v. Alleott* (1787), 2 T. R. 166; *Speight v. Olivier* (1819), 2 Stark. 493.

(b) Note to *Grinnell v. Wells* (1844), 7 Man. & G. 1033, 1044.

(c) *Jones v. Brown* (1794), 1 Esp. 217.

(d) *Hall v. Hollander* (1825), 4 B. & C. 660; *Flemington v. Snuthers* (1826), 2 C. & P. 292. So, too, where the child is induced to leave her home in order to become a member of a religious society; *Lough v. Ward*, [1945] 2 A. E. R. 338.

(e) *Jones v. Brown* (1794), 1 Esp. 217; Peake 306.

(f) *Hall v. Hollander* (1825), 4 B. & C. 660.

(g) *Bennett v. Alleott* (1787), 2 T. R. 166; *Peters v. Jones*, [1914] 2 K. B. 781, 786.

is enough, whether it be based on contract or on the parent's right to control his children under age as their natural guardian. In *Terry v. Hutchinson* (h), the daughter, who was nineteen years of age, was employed by a draper at Deal. He dismissed her, and on her railway journey to Canterbury where her home was, she was seduced by the defendant. A verdict of £150 damages for her father was upheld on the ground that, so long as the father had the right to her service, it was of no moment that he had not actually exercised it; and, as she was a minor, his right to it revived when her contract of employment with the draper ended and she showed an intention to return home. Indeed, it is possible in this connexion for the child to serve two masters at the same time—her employer and her parent—and the defendant may quite well expose himself to two separate actions. In *Rist v. Faux* (i), the daughter worked for X as a farm labourer daily from 7 a.m. to 6 p.m. at 5s. a week, and was at home daily from 6 p.m. to 7 a.m. during which time she looked after her invalid mother. It was held that this was sufficient evidence of service to her father to enable him to recover damages from X for her seduction even though it might have occurred at a time when she was bound to serve X (k).

If, however, another person has a right to the whole of the child's services, the parent cannot be said to retain any. In *Hedges v. Tagg* (l) the plaintiff's daughter was employed as a governess by X, who gave her three days' special leave to go home and see some races at Oxford. During this leave she assisted in the domestic duties and was seduced by the defendant. It was held that her parent could not maintain the action (m). *Terry v. Hutchinson* (supra) was distinguished on the ground that there the service with the draper had terminated, while here the daughter was not going home for good nor even for the legal holiday to which her contract

(h) (1868), L. R. 3 Q. B. 599.

(i) (1863), 4 B. & S. 409.

(k) See, too, Bramwell, B., in *Thompson v. Ross* (1859), 29 L. J. Ex. 1, 3; *Harper v. Luffkin* (1827), 7 B. & C. 387 (father of married woman, who was separated from her husband and living with her father, held entitled to recover damages for her seduction by A); *Ogden v. Lancashire* (1866), 15 W. R. 158.

(l) (1872), L. R. 7 Ex. 283 (W. Cases, 95).

(m) X could have done so, assuming loss of service to him to have been proved; but his right would have been based on interference with the contract of employment.

§ 71. with X entitled her (n), but only on leave conceded to her as a favour (o).

A contract of service made by the defendant with the child for the mere purpose of getting her under his control to seduce her is nugatory (p). Nor indeed will any fraud used in enticing away the child take away the parent's right to its service (q).

238 The particular services rendered may be of the most trivial kind, such as making a cup of tea for the parent (r), or milking cows (s).

?? If the parent either intentionally or by gross negligence connives at the seduction of his daughter, he will lose his remedy (t). Whether we regard the real or fictitious basis of the action, this is only just; for his moral callousness negatives any outrage on his family honour and, as to loss of service, *volenti non fit injuria* (u).

In these seduction cases, the mere act of carnal knowledge of the daughter does not constitute loss of service. Thus in *Eager v. Grimwood* (a), the defendant seduced the plaintiff's daughter. A child was born, but was proved not to be the child of the defendant. Held, there was no proof of loss of service (b); so, too, if the daughter's confinement took place

(n) *Quære*, whether return home on such a holiday would have supported the action? Kelly, C.B., at p. 285.

(o) See, too, *Thompson v. Ross* (1859), 29 L. J. Ex. 1.

(p) *Speight v. Olivera* (1819), 2 Stark. 493.

(q) *Evans v. Walton* (1867), L. R. 2 C. P. 615.

(r) *Carr v. Clarke* (1818), 2 Chit. 260; *Manvell v. Thomson* (1826), 2 C. & P. 303.

(s) *Bennett v. Alcott* (1787), 2 T. R. 166, 168 (*per* Buller, J.).

(t) *Reddie v. Scoolt* (1794), Peake 316.

(u) In *Verry v. Watkins* (1836), 7 C. & P. 308, it was ruled at *nisi prius* that evidence of the daughter's unchastity with other men was admissible in reduction of damages. It is not very intelligible why the misbehaviour of the child should affect the remedy of a parent who is in no way blameable for it. If the loss of service were due, not to seduction, but to some other act like battery, negligence or the like, the fact that the child had wrongfully provoked or caused the harm which resulted in the loss of service might very likely deprive the parent of his action (and it does so according to the American Restatement of Torts, § 703); but that is another matter. However, in the note to *Verry v. Watkins* several other rulings at *nisi prius* on the admission of evidence of the daughter's misconduct are cited, and perhaps they were due to Lord Ellenborough's opinion in *Dodd v. Norris* (1814), 3 Camp. 519, that the allowance of any compensation to the parent in this action for injury to his feelings, as distinct from injury by loss of the child's services, was an anomaly and, although it was established as law, yet it was not to be encouraged.

(a) (1847), 1 Ex. 61.

(b) So, too, the Canadian case of *Harrison v. Prentice* (1897), 27 A. R. 677.

when she was not in the service of her parent (c). But the mental agitation and consequent medical attention which follow upon seduction and abandonment of the daughter by the defendant are enough to raise a presumption of loss of service (d).

The remedy in this tort is that of the parent, not of the child. Indeed, the child, where it is of sufficient age to assent and does assent, to the defendant's act which deprives the parent of its services, has no civil action at all, whether the interference takes the form of seduction or detention, or assault, or the negligent infliction of injuries. *Volenti non fit injuria* would be an answer to any civil claim (e). Where the child does not assent, e.g., where the defendant has committed rape of a man's daughter, the child of course can sue on her own account and the parent can maintain the action for loss of service (f). Note, too, that there are criminal remedies for abduction of females and for kidnapping generally (g), and magistrates have power to make affiliation or bastardy orders whereby the father of an illegitimate child can be compelled to contribute to its support (h).

(c) *Hedges v. Tagg* (1872), L. R. 7 Ex. 283. The *dicta* of Bramwell, B., at p. 286, are a logical application of the "service" fiction and show the rule at its worst. In *Davies v. Williams* (1847), 10 Q. B. 725; 16 L. J. Q. B. 369, it was held that if A is seduced by B while A is in the service of C, and A's child is born while A is in the service of D, D cannot sue B; but this decision, although favoured by *dicta* in *Hedges v. Tagg*, is inconsistent with principle (for the gist of the action is loss of service), illogical in its reasoning and hard to reconcile with *dicta* in *Rist v. Faux* (*ante*, p. 237), which was the decision of a strong Court of Exch. Chamber.

(d) *Manvell v. Thomson* (1826), 2 C. & P. 303; so, too, *Harrison v. Prentice* (*supra*). It is true that *Manvell's Case* was only a *ni si prius* ruling and that in *Boyle v. Brandon* (1845), 13 M. & W. 738, the Court of Exchequer queried whether illness in consequence of seduction and abandonment (without pregnancy) were sufficient loss of service; but *Manvell's Case* was not cited and no opinion was expressed in the judgment itself. The interpolations of the learned Barons in the course of argument seem to be based on ideas now obsolete as to remoteness of damage.

(e) Cf. *Brownlee v. Macmillan*, [1940] A. C. 80.

(f) *Mattouk v. Massad*, [1943] A. C. 588, where it was pointed out that, with respect to the parent's action, the fact that rape is a felony does not bar the action. See *Appleby v. Franklin*, *ante*, p. 163.

(g) Archbold, Criminal Pleading (31st ed., 1943), 1003.

(h) Stone's Justices' Manual, title "Bastardy".

CHAPTER XI

DEFAMATION (a)

§ 72.
Definition.

§ 72. *Defamation is the publication of a statement which tends to lower a person in the estimation of right-thinking members of society generally; or which tends to make them shun or avoid that person.*

It is *libel* if the statement be in permanent form and *slander* if it consist in significant words or gestures (b).

Many writers define defamation simply as the publication of a statement which tends to bring a person "into hatred, contempt or ridicule". But this is not quite exact, for a statement may possibly be defamatory even if it does not excite in reasonable people feelings quite so strong as hatred, contempt or ridicule (c); and the definition is defective in omitting any reference to the alternative of "tending to shun or avoid". This addition is necessary, for falsely imputing insolvency or insanity to a man is unquestionably defamation, although, far from tending to excite hatred, contempt or ridicule, it would rouse only pity and sympathy in the minds of reasonable people (d), who would nevertheless be inclined to shun his society. And Slessor, L.J., took this view in *Youssoupoff v. Metro-Goldwyn-Mayer Pictures, Ltd.*, where a cinematograph film falsely imputed that the plaintiff, a Russian

(a) The leading monographs are Gatley, *Libel and Slander* (3rd ed 1938); Odgers, *Libel and Slander* (6th ed. 1929); Fraser, *Libel and Slander* (7th ed. 1936); Bower, *Actionable Defamation* (2nd ed. 1923); Ball, *Libel and Slander* (2nd ed. 1936); Button, *Libel and Slander* (2nd ed. 1946). For textbooks, see Pollock, *Torts*, Ch. VIII; Salmond, *Torts*, Ch. XIII; Clerk & Lindsell, *Torts*, Ch. XX; for the history of the tort, Holdsworth, *H. E. J.* viii, 346—378, and in 40 *L. Q. R.* (1924), 302—315, 397—412, 41 *L. Q. R.* (1925), 13—31 (Defamation in the sixteenth and seventeenth centuries); Frank Carr in 18 *L. Q. R.* (1902), 255—273, 388—399 (Defamation with especial reference to the distinction between libel and slander); Van Vechten Veeder in *Select Essays in Anglo-American Legal History* (1909), III, 446—473; for Dominion legislation, Dr. Williams in 21 *Journal of Comparative Legislation* (1939), 161—178.

(b) The test adopted by the American Restatement of Torts, § 568, is more elaborate.

(c) *E.g.*, *Tournier v. National, etc., Bank of England*, [1924] 1 K. B. 461.

(d) *Pace Juvenal*: *Nihil habet infelix paupertas durius in se
Quam quod ridiculos homines facit.*

(Sat. iii, 152—153).

princess, had been raped or seduced by the notorious monk, Rasputin, for this tended "to make the plaintiff be shunned and avoided and that without any moral discredit on her part" (e).

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The words must tend to give rise to the feelings mentioned in the definition (f). But on the part of whom? The answer is, the reasonable man. This rules out on the one hand persons who are so lax or so cynical that they would think none the worse of a man whatever was imputed to him, and on the other hand those who are so censorious as to regard even trivial accusations (if they were true) as lowering another's reputation, or who are so hasty as to infer the worst meaning from any ambiguous statement. It is not these, but the ordinary citizen, whose judgment must be taken as the standard. The question, as Lord Atkin suggested, is, "Would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally?" (g). Now it often happens that such "members of society generally" cannot form any opinion at all until it is made clear to them that some particular section of right-thinking men in the community would attach a defamatory signification to the words. As Lord Atkin said in the same context, we have "to consider the person or class of persons whose reaction to the publication is the test of the wrongful character of the words used" (h). Any right-thinking person would know what imputation is conveyed by calling a man a thief. But not many people outside America would know that calling a man a "shyster" means that he is a lawyer of disreputable professional character. In such circumstances the plaintiff, by the form of pleading called an "innuendo" (*post*, § 79), must prove this secondary meaning. But when he has done so, it will still be right-minded persons "generally" whose opinion whether the matter is defamatory or not must be regarded as the criterion; for *any* reasonable person (as distinguished from

(e) (1934), 50 T. L. R. 581, 587 (W. Cases, 97). But would reasonable people shun the society of a woman who had the misfortune to be raped? 51 Law Quarterly Review (1935), 281-282. Slessor, L.J., saw the difficulty but dismissed it with the remark: "It is to shut one's eyes to realities to make these nice distinctions".

(f) Proof that they actually did give rise to it is unnecessary: *Hough v. London Express Newspaper*, [1940] 2 K. B. 507.

(g) *Sim v. Stretch*, [1936] 2 A. E. R. 1237, 1240.

(h) *Ibid.* Cf. *Byrne v. Deane*, [1937] 1 K. B. 818, and criticism of it in 83 Law Journal, 264

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one of a particular class of persons) would be likely to think the worse of a man charged with professional dishonesty although it might be necessary to interpret for him in the first instance the word "shyster", which imputes it, and which is, on the face of it, intelligible only to one class of people.

Conversely, if the plaintiff can prove that the statement tends to discredit him with only one special class of persons, it is not defamatory unless reasonable people in general would take the same view (i). Suppose that A is a member of a club which bans the wearing of coloured shirts and that B falsely accuses him of openly wearing one. That may tend to make A unpopular with members of the club, but B has committed no defamation; had he been accused of misappropriating the club funds, the case would have been otherwise; for while right-minded persons in general are indifferent to the hue of other people's underwear, they dislike dishonesty in any quarter; but there is nothing dishonest or dishonourable in openly breaking a club rule of this sort (k).

The law of defamation is in many respects irrational and hair-splitting. "No branch of the law", said Sir Frederiek Pollock (l), "has been more fertile of litigation than [defamation] (whether plaintiffs be more moved by a keen sense of honour (m), or by the delight of carrying on personal controversies under the protection and with the solemnities of civil justice) nor has any been more perplexed with minute and barren distinctions." Here, as elsewhere, historical development is responsible for an excess of judicial subtlety.

Distinction
between libel
and slander.

Examples of libel as distinguished from slander, are a picture, statue, wax-work effigy, or any writing, print, mark or sign exposed to view. The representation must be "permanent", but the word must not be interpreted too meticulously. Presumably sky-writing by an aeroplane would be a libel, although the vapour which composes it disappears

(i) Cf. Lord Halsbam in *Tolley v. Fry & Sons, Ltd.*, [1931] A. C. 333, 339; McCardie, J., in *Myroft v. Sleight* (1921), 90 L. J. K. B. 883, 886, citing Farwell, L.J., in *Lectham v. Rank* (1912), 57 S. J. 111; *Miller v. David* (1874), L. R. 9 C. P. 118.

(k) This seems to be the reconciliation of apparently inconsistent statements in some of the text-books; e.g., Gatlley, *op. cit.*, 15; Fraser, *op. cit.*, 8-9.

(l) Torts, 189.

(m) "Job, who was the mirror of patience, . . . became *quodammodo* impatient when libels were made of him": *Case de Libellis Famosis* (1605), 5 Rep. 125 a, 126 a.

soon (n). On the other hand, defamation in the manual language of the deaf and dumb, and mimicry and gesticulation generally (c.g., holding up an empty purse to indicate that the plaintiff has robbed the defendant (o)) would probably be slander, because the movements are more transient. These examples show that it is only broadly true to say that libel is addressed to the eye, slander to the ear (p). Despite some inconsistency in the authorities, it seems that the form in which defamatory matter is published will determine whether it is libel or slander and that it is possible for exactly the same statement or representation to be slander on one occasion and libel on another. Publication (§ 81, *post*) means communication to at least one other person than the person defamed and it is generally agreed that publication is an essential of defamation (q). Now it needs no demonstration that if an oral utterance is communicated orally it is a slander that is published, or that if a written statement is shown to a third person, it is a libel that is published. But further, if an oral statement by A is written down by B and shown by B to C, it is a libel, not a slander, that B has published. No doubt A's original uttering of the words to B may have been slander, but then the communication was oral; whereas disclosure of the writing by B to C is not oral. Conversely, if A writes to B a letter defamatory of X and B reads it aloud to C, it ought to be a slander that is published by B, not a libel; so, too, if I dictate a letter to my typist: but the balance of authority is the other way, although it has very little reasoning in support of it (r). In this connexion it has been questioned whether defamatory matter on a gramophone is, as such, libel or only potential slander (s). If the test be, as we have suggested, "What is the mode of publication?" it seems to be

(n) So, too, Harry Richmond's father in George Meredith's novel of that name, who for some hours personated as a statue another man.

(o) Lord Ellenborough, *C.J.*, in *Cook v. Cox* (1814), 110, 114.

(p) Fraser, *op. cit.*, 4—5.

(q) Fraser, *op. cit.*, 3, note (c), is an exception; but the *dicta* cited do not support this view.

(r) In *Forrester v. Tyrrell* (1893), 9 T. L. R. 257, the C. A., following *dicta* in the *Case de Libellis Famosis* (1605), 5 Rep. 125 a, and in *Lamb's Case* (1611), 9 Rep. 59 b, held it to be libel. In *Osborn v. Boulter*, [1930] 2 K. B. 226, 231, 237, Scrutton and Slessor, L.J.J., were of opinion *obiter* that it is slander; *contra*, Greer, L.J., at p. 236; *Forrester v. Tyrrell* was not cited.

(s) Pollock, *Torts*, 188 n.

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potential slander (t). Of course the record as such is in permanent form, but that does not settle the point, for matter on the record is not communicated to any one until a needle is applied to the record, and then it takes the form of speech. No doubt the defamation may have been communicated to any one who happened to be present while the speaker was consigning it to the record, but *then* the words were spoken and therefore slanderous; that, however, throws no light on what their reproduction by the needle would be (u). The Court of Appeal, in *Youssoupoff v. Metro-Goldwyn-Mayer Pictures, Ltd.* (a), had no doubt that defamatory matter embodied in a "talking" cinematograph film was a libel. "There can be no doubt that, so far as the photographic part of the exhibition is concerned, that is a permanent matter to be seen by the eye, and is the proper subject of an action for libel, if defamatory. I regard the speech which is synchronised with the photographic reproduction and forms part of one complex, common exhibition as an ancillary circumstance, part of the surroundings explaining that which is to be seen" (*per* Slessor, L.J.) (b). This reasoning neatly solves any difficulty which might be felt where the gramophone and the picture film are combined to make a "talking" film; but it still leaves open the question whether a gramophone record unaccompanied by any pictorial representation is libel or slander. Broadcasting raises similar questions (c). In Victoria, reading from a script of defamatory matter into a broadcasting apparatus which was effectively connected with receiving apparatuses has been held to be slander, not libel (d). In America the law seems to be exactly the opposite (e). But this is by no means the only problem which awaits solution

(t) 51 L. Q. R. (1935), 281—283; 573—574. *Contra*, Salmond, Torts, p. 371, and Mr. P. A. Landon, in his edition of Pollock, Torts, 188 n.

(u) *Semble*, matter confided to a parrot is slander when repeated by the bird to another person.

(a) (1934), 50 T. L. R. 581 (W. Cases, 97).

(b) 50 T. L. R., at p. 587.

(c) In *Bergman v. Macadam*, Times Newspaper, Oct. 8, 1940, Charles, J., held it to be slander. It does not appear whether the broadcasting was from a script or not.

(d) *Meldrum v. Australian Broadcasting Co., Ltd.* (1932), Victorian L. R. 425; 51 L. Q. R. (1935), 573—574.

(e) Restatement of Torts, vol. iii, p. 164; 46 Harvard Law Review (1932), 133—134.

in broadcasting (f). Discussion of these border-line cases is not purely academic, for there are some notable practical differences between libel and slander (*post*, § 74). The distinction, however, is purely historical and is obviously antiquated in relation to modern inventions. Its abolition was recommended by a strong committee in 1843 (g). §§ 72, 73.

§ 73. *Abuse*.—It is commonly said that mere vulgar spoken abuse is neither defamation nor indeed any other tort (h); but this needs some explanation. Spoken words which are *prima facie* slanderous are not actionable if it is clear that they were uttered merely as general vituperation and were so understood by those who heard them (i). This makes the manner in which the words were spoken very important in determining whether they were mere vituperation or slander. It is possible that the same word may or may not be slanderous according as it is said deliberately in cold blood, or is bawled out at the height of a violent quarrel (j). “The manner in which the words were pronounced, and various other circumstances might explain the meaning of the word”. So Sir James Mansfield, C.J., in *Penfold v. Westcote* (k) where the defendant called out, “Why don’t you come out you blackguard, rascal, scoundral [*sic*], Penfold, you are a thief”, and it was left to the jury to say whether the general abusive terms accompanying “thief” reduced “thief” itself to mere abuse; and the jury gave a verdict for the plaintiff. Vituperation or abuse.

The speaker of the words must take the risk of his hearers construing them as defamatory and not simply abusive, and the burden of proof is upon him to show that a reasonable man would not have understood them in the former sense (l).

If the words be written, not spoken, they cannot be protected as mere abuse, for the defendant had time for reflection

(f) *E.g.*, does the radio listener hear the original utterance of the speaker, or does he hear sounds created, controlled and “uttered” by the broadcaster? This and other questions are discussed in 46 *Harvard Law Review*, 133—138. (g) Spencer Bower, *op. cit.*, 289—290.

(h) “For mere general abuse spoken, no action lies”: Mansfield, C.J., in *Thorley v. Kerry* (1812), 4 Taunt. 355, 365; Pollock, C.B., and Wilde, B., in *Parkins v. Scott* (1862), 1 H. & C. 153, 158, 159.

(i) Gatley, *op. cit.*, 56—57, 78; Odgers, *op. cit.*, 41—43; Fraser, *op. cit.*, 31; Salmond, *Torts*, § 99 (3). See, too, Dean Roscoe Pound in *Selected Essays on the Law of Torts* (1924), 110—118.

(j) A point which seems to have been overlooked in the criticism in Salmond, *Torts*, p. 373, of the reason why written words cannot be protected as mere abuse.

(k) (1806), 2 B. & P. (N. R.) 335.

(l) Gatley, *op. cit.*, 141.

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before he wrote and his readers may know nothing of any heated dispute or other circumstances which may have led him to write what he did; but it is quite possible for them to be not defamatory for some other reason.

Although there is no civil remedy for mere vituperation, a person may be bound over by justices of the peace to be of good behaviour if he utters rash, quarrelsome or unmannerly words which tend to a breach of the peace or which deter an officer from doing his duty (*m*).

Differences
between libel
and slander.

§ 74. Differences between slander and libel.

Slander and libel differ from one another in several notable points.

First, libel, if it tends to provoke a breach of the peace, is a crime as well as a tort. Slander, as such, is never criminal, although spoken words may be punishable as being treasonable, seditious, blasphemous or the like.

Secondly, libel is actionable *per se*, i.e., without proof of special damage. In slander, special damage must be proved except in the cases stated in the next section.

The rules as to libel are therefore more severe for the defendant, and this is said to be justifiable on the ground that libel is much more permanent in character and therefore more likely to do harm to the person defamed; moreover, there is an irresistible tendency on the part of most people to believe almost anything they see in print and if a lie appears in a newspaper, even if it is nailed to the counter, it is not likely that every one who read and believed the lie will also read a possible apology in a succeeding issue of the same newspaper.

Special
damage

“Special” damage is a phrase which has been rightly criticised as either meaningless or misleading and “actual” damage has been suggested as a more accurate expression (*n*). But whatever be the adjective used, it signifies that no damages are recoverable merely for loss of reputation by reason of the slander, but that the plaintiff must prove loss of money or of some temporal or material advantage estimable in money. If there is only loss of the society or *consortium* of one’s friends, that is not enough. Hence, while loss of your friend’s hospitality is special damage, exclusion from the

(*m*) Stone’s Justices’ Manual, title “Surety for good behaviour.”

(*n*) Bower, *op. cit.*, Art. 13. See, too, judgment of Bowen, L.J., in *Ratcliffe v. Evans*, [1892] 2 Q. B. 524

religious congregation to which you belong is not; for a dinner has temporal and material value, while spiritual communion has none in this connexion (o).

Where there is no need to prove special damage in defamation, the plaintiff can recover general damages for the injury to his reputation without adducing any evidence that it has in fact been harmed, for the law presumes that *some* damage will arise in the ordinary course of things. It is enough that the immediate tendency of the words is to impair his reputation. Whether they have that tendency is a question of law for the Judge and of this more will be said when we speak of "innuendo" (*post*, § 79). If the plaintiff contends that special damage has been suffered in addition to general damages, he must allege it in his pleadings and prove it at the trial, but even if he breaks down on this point, he can still recover general damages (p).

Damage must of course not be too remote. The general principles as to this have already been detailed (q), and the only peculiarity in defamation is that illness arising from mental worry induced by slander not actionable *per se* is too remote (r), although in slander actionable *per se*, libel and other torts that is not now the law provided it amounts to nervous shock (s). The exception has been defended on the ground that otherwise the Courts might be pestered with an infinity of trumpety or groundless actions (t).

If A slanders B so that B is wrongfully dismissed by C from C's employment, it has been held that A is not liable to B, because the "special damage must be the legal and natural consequences of the words spoken" and that A is no more responsible for C's unlawful act than he would be if B's neighbours, believing A's lie to be true, were to duck B in a horse-pond. But this reasoning cannot now be regarded as law, for although the case in which it was put forward—*Vicars v. Wilcocks* (u)—has not been actually overruled (indeed, on the facts the decision may have been correct), yet the *ratio*

(o) *Roberts v. Roberts* (1864), 5 B. & S. 384; *Davies v. Solomon* (1871), L. R. 7 Q. B. 112.

(p) *Odgers, op. cit.*, 305; *Gatley, op. cit.*, 621.

(q) *Ante*, § 21.

(r) *Allsop v. Allsop* (1860), 5 H. & N. 534.

(s) *Ante*, p. 77; *Gatley, op. cit.* 84.

(t) *Wright, J.*, in *Wilkinson v. Downton*, [1897] 2 Q. B. 57, 60.

(u) (1806), 8 East 1

§§ 74, 75. *decidendi* encountered strong adverse criticism in later cases in the House of Lords and in other Courts. In *Lynch v. Knight* (a), Lord Wensleydale said: "To make the words actionable by reason of special damage, the consequence must be such as, taking human nature as it is, with its infirmities, and having regard to the relationship of the parties concerned, might fairly and reasonably have been anticipated and feared would follow from the speaking the words" (b). In other words, if A does an unlawful act to B, the chain of causation may possibly be severed by the unlawful act of C, but it does not in the least follow that it must necessarily be severed thereby (c).

Unauthorised repetition of the words by other persons will make the damage too remote (d), unless there is a legal or moral duty to repeat them (e), a rule which applies equally to libel (f).

Slander
actionable
per se.

§ 75. Slander actionable *per se*.

The exceptional cases in which slander is actionable without proof of special damage are:—

Imputation of
(1) Crime.

(1) *Imputation of a criminal offence punishable with imprisonment, but this does not include an offence for which imprisonment may be inflicted on non-payment of a fine which has been imposed* (ff).—*Hellwig v. Mitchell* (g) is a good modern illustration of this. The defendant was the proprietor of a hotel at Southend. He said to the plaintiff, a hairdresser who was in the hotel, "I cannot have you here; you were on the premises last night with a crowd, and you behaved yourself in a disorderly manner and you had to be turned out". It was held that these words (which were untrue) imputed neither the crime of unlawful assembly, nor that of being drunk and disorderly; and that even if they imputed a breach of the peace, yet that would not suffice, because, although a breach of the peace may lead to preventive arrest, yet it is not punishable with imprisonment in the first instance.

(a) (1861), 9 H. L. C. 577, 600.

(b) See, too, *Bowen v. Hall* (1881), 6 Q. B. D. 333, 339.

(c) *Ante*, pp. 74—75. See, too, *Galley, op. cit.*, 87—89.

(d) *Ward v. Weeks* (1830), 7 Bing. 211; *Parkins v. Scott* (1862), 1 H. C. 153.

(e) *Derry v. Handley* (1867), 16 L. T. 263.

(f) *Weld-Blundell v. Stephens*, [1920] A. C. 956, 987, 999.

(ff) *Ormiston v. G. W. Ry.*, [1917] 1 K. B. 698.

(g) [1910] 1 K. B. 609 (W. Cases, 99).

If the slander goes into details of the offence charged, it is not actionable *per se* if the details are inconsistent with one another, as in *Jackson v. Adams* (*h*) where the defendant said to the plaintiff, a churchwarden, "Who stole the parish bell-ropes, you scamping rascal?" As the possession of the ropes was vested in the churchwarden, theft of them by the plaintiff was impossible. But there is authority for the proposition that the basis of the rule, that imputation of a criminal offence is actionable *per se*, is the probability of social ostracism of the plaintiff and not his jeopardy of imprisonment (*i*); this seems inconsistent with *Jackson v. Adams*.

(2) *Imputation of a contagious or infectious disease likely to prevent other persons from associating with the plaintiff.*— (2) Disease
There is some uncertainty about this exception, none the less so because there is no reported decision on it later than 1844 (*k*), nor are the modern monographs on defamation entirely in agreement on the topic (*l*). It has always included venereal disease and, in olden times, plague and leprosy. Perhaps at the present day it covers any disease which is infectious or contagious whether it be "owing to the visitation of God, to accident, or to the indiscretion of the party therewith afflicted" (*m*); for, although an accusation of smallpox was held in 1599 not to be actionable at all, the decision turned upon a rule of interpretation now extinct (*n*).

(*h*) (1835), 2 Bing. N. C. 402

(*i*) *Gray v. Jones* (1939), 160 L. T. 361. In *D. & L. Caterers, Ltd. v. D'Ajou*, [1945] K. B. 364, the C. A. left open the question whether a slander which imputes to a corporation an offence, which in the case of an individual is punishable with imprisonment, is actionable *per se*. It is submitted that, as the law stands at present, the answer ought to be in the negative, for if the basis of this species of slander actionable *per se* is jeopardy of imprisonment, a corporation, being an artificial person, cannot be imprisoned, and if its basis is the probability of social ostracism, a corporation cannot as such be subjected to social ostracism, though ostracism of it as a trading body is possible.

(*k*) *Bloodworth v. Gray*, 7 Man. & G. 334.

(*l*) Gatlley, *op. cit.*, 59—61; Odgers, *op. cit.*, 44—45, Fraser, *op. cit.*, 32—33; Bower, *op. cit.*, 25—26.

(*m*) Bacon, Abr. (7th ed. 1832), vii, 266—267 (Slander).

(*n*) *James v. Rutledge*, 4 Rep. 17 a; ambiguous words were there interpreted *mitiori sensu*, i.e., in the sense more favourable to the defendant. Hence at that time to charge a person with "pox" (which might mean venereal disease or smallpox) was regarded as an accusation of the less repulsive ailment—smallpox. In *Villers v. Monsley* (1769), 2 Wils. 403, there were *obiter dicta* that oral imputation of the itch was not actionable, but the case itself was one of libel, not slander.

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(3) Un-
chastity.

(3) *Imputation of unchastity (o) or adultery to any woman or girl.*—This is a statutory exception created by the Slander of Women Act, 1891 (p).

(4) Incom-
petence.

(4) *Imputation of unfitness, dishonesty or incompetence in any office held by the plaintiff, or in any lawful profession or trade carried on by him.*—This is by far the most important, because the most frequent, exception. Examples are charging a trader (q) with cheating or insolvency, a surgeon with incompetence, a lawyer with ignorance. But in all these cases “there must be some reference, direct or indirect, in the words themselves, or in the circumstances attending their utterance, which connects the subject-matter of the slander with the office held, or the profession or trade carried on, by the plaintiff” (qq); moreover, “office” does not include a duty cast upon persons generally; e.g., where, during the war, the plaintiff was slandered in her capacity as a fire-watcher (r).
 ✓ “If the words merely impute to the plaintiff some misconduct unconnected with his office, profession or trade, they are not actionable without proof of special damage: it is not sufficient that they are calculated to injure him therein” (s). That is still unquestionably the law, but it has led to some results that any layman would regard as chopping logic. Thus, to impute incontinence to a clergyman is not actionable *per se* unless he holds a benefice or some clerical office of temporal profit from which his removal would be justified if the accusation were true (t). So, too, if adultery be imputed to a schoolmaster in the way of his calling, it is actionable *per se*, but not if the slander has no reference to his calling. Thus, in *Jones v. Jones* (u), where the defendant orally accused the plaintiff, a headmaster, of adultery with a woman employed as a cleaner on the school premises, the House of Lords held that this could not be actionable without proof of special

(o) Held in *Kerr v. Kennedy*, [1942] 1 K. B. 409, to include an imputation of Lesbianism.

(p) 54 & 55 Vict. c. 51, s. 1. See Odgers, *op. cit.*, 61—63.

(q) Whether an individual or a corporation; *D. & L. Caterers. Ltd. v. D'Ajou*, [1945] K. B. 364.

(qq) Gately, *op. cit.*, 61.

(r) *Cleghorn v. Sadler*, [1945] K. B. 325. (s) Gately, *op. cit.*, 61.

(t) *Gallwey v. Marshall* (1853), 9 Ex. 294. Cf. *Pemberton v. Colls* (1847), 10 Q. B. 461.

(u) [1916] 2 A. C. 481 (W. Cases, 103). Cf. *De Stempel v. Dunkels* (1937), 54 T. L. R. 289 (in the H. L. the appeal was on another point: 55 T. L. R. 655).

damage, because no evidence was given that the words were spoken of him in the way of his calling. It was urged with some cogency that to charge a schoolmaster with adultery, whether in the course of his professional activities or as an incident in his private life, would equally imperil his continuance in his post as showing him to be unfit to have the care of boys. But the House of Lords replied to this that they could not by judicial legislation extend the Slander of Women Act, 1891, to men. Some of the noble and learned lords seemed not unwilling to extend such principle as there was to include the case before them, but found themselves unable to do so because the law of slander depends on so many artificial distinctions that it exhibits in this point no principle worth the name (v). On the other hand, Lord Parmoor held that there was a principle but that it could not be stretched to cover this case because there was a long line of settled decisions to the contrary (w). And Lord Sumner went still farther in regarding the law as founded upon settled and satisfactory principles which were capable of extension but which did not apply to these facts (a).

In *Hopwood v. Muirson* (b) X wished to hire a house from Y. Z, a friend of X, allowed X to give Z's name to Y for purposes of reference. Z was a solicitor, but here he was not acting in his professional capacity. Y said to X: "You have got a reference from that pimp Z. It is quite worthless. His very calling as a solicitor makes him write whatever suits his clients best. Damn it, he would sue his grandmother for 7s. 6d." The Court of Appeal held that these words were defamatory of Z, but that they were not actionable *per se* because the slander was upon the solicitor as a man, and not upon the man as a solicitor.

The plaintiff must prove that he was engaged in the office, profession or trade at the time that the slander was published (c); but it is possible for a man to conduct several professions simultaneously. Thus, in *Bull v. Vazquez* (d), B, a Member of Parliament, joined the army in 1939 for the

(v) [1916] 2 A. C. 489, 508 (Lords Haldane and Wrenbury).

(w) *Ibid.*, 504.

(a) *Ibid.*, 500.

(b) [1945] K. B. 313. Cf. *Doyley v. Roberts* (1837), 3 Bing. N. C. 835; *Re Weare*, [1893] 2 Q. B. 439; Pollock, *Torts*, 195; Gatley, *op. cit.*, 71.

(c) *Bellamy v. Burch* (1847), 16 M. & W. 590; *Gallwey v. Marshall*, (1853), 23 L. J. Ex. 78.

(d) [1947] 1 A. E. R. 334.

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duration of the war and was wounded on active service. In 1945 he was absent from the army on "indefinite Parliamentary leave", but he was still subject to military law and was liable at any moment to be recalled for active service. In 1945 the defendant, V, said of him: "I do not believe he was wounded. It is my opinion he was sent home for drinking too much spirits". It was held by the Court of Appeal that the slander was actionable *per se*, for the facts showed that at the time it was uttered B was still pursuing his profession as an officer in the army.

If the office held by the plaintiff be an honorary one, slander affecting the plaintiff is not actionable *per se* unless, if true, it would be a ground for removing him from the office. In *Alexander v. Jenkins* (e), the plaintiff was a town councillor and the words were, "Alexander is never sober, and is not a fit man for the council. On the night of the election he was so drunk that he had to be carried home". As intoxication is no ground for removal from such a post, and as the plaintiff proved no special damage he lost his case (f). So, too, to say of a justice of the peace, "He is an ass and a beetle-headed justice!" is not actionable *per se*, for it imputes ignorance of the law and he need know none (g). The somewhat unsatisfying reason given by Holt, L.C.J., for this distinction about honorary offices was that a man cannot make himself wiser or more able than he is—he cannot add to his ability—but he may make himself a better man (h). Whatever may be thought of this, the result is that it is one thing to question a man's capacity for an honorary office and quite another to impugn his honesty in its discharge. Therefore, while a false charge of incompetence is not actionable without proof of special damage, a false charge of dishonesty is actionable *per se* and, in that case, it is immaterial whether there is or is not a power of removal from the office for such misconduct (i).

Reason for
exceptions

Two questions may well be asked by the student. One is, "Why should some, but not all, slanders be actionable *per*

(e) [1892] 1 Q. B. 797

(f) Kay, L.J. (at pp. 805—806), inclined to think that if Alexander had been charged with drunkenness while he was a candidate for the post, that would have been actionable *per se*. But this is questionable, for during his candidature he would not have held the office, and the essence of the rule about slander being actionable *per se* is that the words shall be uttered of the plaintiff touching his office

(g) Cited in *How v. Prinn* (1702), 2 Salk 695; Holt 652

(h) Lord Herschell in *Alexander v. Jenkins*, [1892] 1 Q. B. 797, 801.

(i) *Booth v. Arnold*, [1895] 1 Q. B. 571.

se?" The other is, "Why has not the distinction been applied to libels?" The answers to both questions are historical, and have been discussed by Sir William Holdsworth (*k*).

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As to the first, in early times, apart from some inadequate statutes, defamation was not actionable at Common Law, but was redressible only in the ecclesiastical or the local Courts. Then the Common Law Courts, fearing that their ecclesiastical brethren might monopolise jurisdiction here, gradually allowed an action upon the case for written or spoken words. But just because it was an action upon the case, damage had to be proved. Here, then, the law made a false start. What they ought to have remedied was insult; what they did remedy was insult *plus* pecuniary loss. Damage, not insult, was the gist of the action. To this rule were attached the exceptions just discussed.

Probably the oldest of these is the imputation of a criminal offence punishable with imprisonment. No satisfactory explanation of this has ever been given (*l*). At any rate, the qualification that the offence must be punishable with imprisonment is untraceable in the Year Books, inconsistent with principle, contrary to practice in the sixteenth and early seventeenth centuries and was not recognised until 1642. It was adopted in order to put a check upon the increase of actions for words (*m*).

The other exceptions developed later. One would be tempted to say that the common origin of all the exceptions (apart from the statutory one due to the Slander of Women Act, 1891) was that accusations of crime, of contagious disease, of incompetence or dishonesty in one's business, are so obviously likely to lead to damage that it would have been foolish to insist upon evidence of it, and to some extent this

(*k*) 40 L. Q. R. (1924), 398—400; 41 L. Q. R. (1925), 14—17.

(*l*) Sir William Holdsworth (40 L. Q. R. 398—400) suggests that it originated in the days when the Common Law Courts were trying to distinguish between words which they would hold to be actionable, and words which were actionable only in an ecclesiastical Court. Thus, if A called B a "traitor" or a "thief", as treason and theft were punishable in the Common Law Courts, they held that lying imputations of these offences were also triable there. But if A called B a "heretic" or an "adulterer", as heresy and fornication were cognisable only in an ecclesiastical Court, false accusations of them were not reckoned as actionable in a Common Law Court. This is clear enough, but how does it explain the fact that the Common Law Courts, where they *did* entertain such actions, departed from their own rule about proof of special damage?

(*m*) 40 L. Q. R. 399, note 7.

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does seem to have influenced the Courts; but it is not a complete explanation.

When these exceptions were established, distinctions of the most ridiculous artificiality were taken by the Courts, although there was a praiseworthy motive at the back of this. The Star Chamber was trying to suppress duelling, and persons who had been insulted consequently resorted to the law Courts, which became flooded with slander actions. The Judges were probably right in trying to stem a spate of litigation on disputes often of a trumpety nature, but they were certainly wrong in the mode which they adopted. They dissected the meaning of opprobrious epithets with as much care as if they had been technical terms in a conveyance of property. Probably the most absurd example was *Holt v. Astgrigg* (n), where the defendant said: "Sir Thomas Holt struck his cook on the head with a cleaver, and cleaved his head; the one part lay on the one shoulder and another part on the other". Was this an accusation of homicide? No, because it was not averred that the cook was killed. Decisions like this made an action for slander in the seventeenth century more like a lottery than a legal proceeding, and their evil effects are felt at the present day.

Why libel is
actionable
per se.

As to the second question, "Why is it unnecessary ever to prove special damage in libel?", the answer in brief is this: The old Common Law action on the case for words applied to both spoken and written words, but actions for written words must, in view of the backward state of printing and the check upon publication which resulted from the necessity of procuring a government licence for it, have been considerably rarer than actions for spoken words. Then, when printing became commoner, defamatory words were dealt with in the Court of Star Chamber principally as a crime. Next, the Star Chamber fell and the Common Law Courts invented an action for libel quite distinct from the action on the case for spoken words. This they did in 1670 in *King v. Lake* (o). And they decided that no damage need be proved, perhaps because the Star Chamber had occasionally given damages, perhaps also because duelling had to be suppressed; and if the plaintiff were driven to proving damage, he might

(n) (1608), Cro. Jac. 184. *Barrons v. Ball* (1613), *ibid.* 331, and *Cooper v. Smith* (1617), *ibid.* 423, are similar curiosities.
(o) *Hardres* 470.

have found the burden so heavy that he would have preferred to vindicate his character with his sword in Leicester Fields rather than by an action in Westminster Hall (*p*).

§ 76. Essentials of defamation generally.

Essentials of
defamation
generally.

Whether defamation consist of libel or slander the following requisites are common to both, and must be proved by the plaintiff.

- (i) The words must be published "maliciously", but this element, as we shall see, is a purely formal one.
- (ii) They must be defamatory.
- (iii) They must refer to the plaintiff.
- (iv) They must be published.

§ 77. Malice.

Malice

We have described in an earlier section (§ 20) the unfortunate ambiguity of this word in the law of tort. In the law of defamation in particular the confusion is even worse, for while malice elsewhere may mean either (i) intentionally doing a wrongful act without just cause or excuse, or (ii) doing an act with an evil motive, in defamation it may not only have either of these significations but may also be used in (iii) a sense which is totally independent of either intention or evil motive and may include mere carelessness or even honest mistake.

"Malice" may figure in two stages of an action for defamation and its meaning varies according to the particular stage in which it occurs.

First, in his statement of claim the plaintiff must always allege that the defendant published the words falsely and maliciously. Here "malice" does not connote spite or any other bad motive. It is usually said that it means the wrongful intention which the law always presumes to accompany an unlawful act, *i.e.*, it is equivalent to sense (i) above. That is true, but it is not the whole truth, for the term also covers cases where there is no intention at all, and includes sense (iii). Thus a man may quite possibly be held liable for defamation where he made only an honest mistake; *e.g.*, where the proprietor of a newspaper erroneously published a statement (which he believed to be true) that the plaintiff had

§§ 77, 78.

given birth to twins. In fact she had been married only a month, but the defendant was ignorant of this. He was held liable (*q*). However, the plaintiff need not trouble himself with any shade of meaning which attaches to malice at this point in the action, provided that he has inserted the word in his statement of claim. From that point onwards no one takes any notice of it at the trial except for the purpose of inflating damages where there has been spite or deliberateness.

But there is a second stage of the action in which "maliciously" is not a mere pleader's adverb but is a term of substance, and the plaintiff must support it by evidence. It arises in this way. Two of the defences to an action for defamation are that what the defendant said or wrote was protected by "fair comment" or by "qualified privilege" (*post*, §§ 84, 85), and if he establishes either of these the plaintiff cannot succeed unless he in turn can prove that there was "malice" on the defendant's part which will destroy the plea of fair comment or the plea of privilege. Here malice means abuse of the fair comment or of the privilege by spite on the part of the defendant. In other words, it is used in either sense (i) or sense (ii) above.

Words must
be defama-
tory.

§ 78. The words must be defamatory.

As was noted in the definition in § 72, the words must tend to lower the plaintiff's reputation in the estimation of right-minded persons, or must tend to cause him to be shunned or avoided.

Jury decide
this

In determining whether they have such tendencies, the functions of Judge and jury must be carefully distinguished. After fierce controversy, Fox's Libel Act, 1792 (*r*), which professed to be a declaratory Act, allotted to the jury in a criminal trial for libel the task of deciding whether the words are defamatory or not; the Act was necessary because Judges had been usurping this function and had thereby warped criminal trials for seditious libels into modes for securing the conviction of political offenders. The provision of Fox's Act with respect to criminal libel has long been regarded as also applicable to civil actions for defamation. It is true that the reasons which led to the Act are much more cogent in criminal

(*q*) *Morrison v. Ritchie & Co*, (1902), 4 F. 645 (a decision in the Scottish Court of Session).

(*r*) 32 Geo. 3, c. 60.

than in civil cases, but there can be no doubt that even in the latter the rule is a salutary one (s).

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Moreover, the jury have by no means unlimited freedom, for the Judge can exercise control in three ways.

But Judge controls them.

First, if he decides to leave the case to the jury, he must tell them what defamation means in law.

Secondly, if he thinks that no reasonable man could regard the words, either in their literal meaning or as explained by an "innuendo" (see § 79, *post*), as defamatory, he must withdraw the case from the jury (t). Capital and Counties Bank, Ltd. v. Henty (u) is a leading case on this. Henty & Sons, a firm of brewers, were in the habit of receiving, in payment from their customers, cheques on various branches of the Capital & Counties Bank, which the bank cashed for the convenience of Hentys at a particular branch of which X was manager. In consequence of a squabble with X, Hentys sent a printed circular to a large number of their customers (who knew nothing of the squabble), "Henty & Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of the Capital & Counties Bank." The circular became known to other persons and caused a run on the bank, which sued Hentys for libel on the ground that the circular imputed insolvency. There was much difference of opinion in the Courts below and it was only after hearing the case twice argued that the House of Lords, by a majority of four to one, held that the circular, taken in conjunction with the circumstances of its publication, did not constitute evidence from which any reasonable persons would infer such an imputation; that there was no case to go to the jury; and that the defendants were not liable. Lord Selborne, L.C., said that the fact that some customers showed the circular to strangers was not the fault of Hentys, who had not authorised the communication (a), and that where words in their natural meaning were not libellous, evidence must be brought to show that reasonable men might be led to understand them in a libellous sense. Both these propositions are unexceptionable, nor is it difficult to follow

(s) *Parmiter v. Coupland* (1840), 6 M. & W. 105; *Baylis v. Lawrence* (1841), 11 Ad. & E. 920; Scrutton, L.J., in *Broome v. Agar* (1928), 138 L. T. 699—700.

(t) *Turner v. Bowley* (1896), 12 T. L. R. 402.

(u) (1882), 7 App. Cas. 741 (W. Cases, 108).

(a) 7 App. Cas. 746—747.

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the opinion of Lord Selborne and Lord Blackburn that there are many reasons why a person may refuse to accept a cheque on a particular bank (*b*). Yet it might be thought that the first ground which would occur to any reasonable person for a refusal of his creditor to take cheques on a bank in circumstances like those of *Henty's Case* would be that the bank was financially unsound; however, *dis aliter visum est* (*c*). At any rate, Lord Blackburn admitted that the circular might have been published in such a way and to such persons as to show that its natural tendency would be to convey an imputation on the bank's credit (*e.g.*, possibly if it had been published in a time of financial panic), though such were not the circumstances here (*d*).

Nevill v. Fine Art Insurance Co., Ltd. (*e*), is another example. N was the West End agent of the defendants. Being dissatisfied with his remuneration, he told them that he wished to sever his connexion with them. The defendants then sent a circular to persons who had dealt with them through N's agency stating that another person had been appointed to their West End agency and that N's agency had "been closed by the directors" of the defendants' company. N sued the defendants for libel. The House of Lords held that the case ought to have been withdrawn from the jury, for no reasonable man would have inferred from the circular anything more than that N had severed his connexion with defendants, which was exactly what had happened.

Thirdly, if the words are obviously defamatory, the Judge, although he cannot directly tell the jury that they are so, may nevertheless indicate to them that the evidence cannot bear any other interpretation. If, in spite of this, they find a verdict for the defendant, a new trial will be ordered on appeal (*f*). But this is so stark an interference with the normal functions of a jury that the Courts are very loth to

(*b*) *Ibid.* 745, 785—786.

(*c*) Scrutton, L.J., in *Youssouppoff v. Metro-Goldwyn-Mayer Pictures, Ltd.* (1934), 50 T. L. R. 581, 584, thought that the law and the facts got pretty far apart from each other in *Henty's Case*.

(*d*) 7 App. Cas. 786. See, too, Lord Dunedin in *Tolley v. Fry & Sons, Ltd.*, [1931] A. C. 333, 342.

(*e*) [1897] A. C. 68.

(*f*) *Levi v. Milne* (1827), 4 Bing. 195; Sankey, L.J., in *Broome v. Agar* (1928), 138 L. T. 698, 701—702; Scrutton, L.J., *ibid.* 699, and in *Youssouppoff v. Metro-Goldwyn-Mayer Pictures, Ltd.* (1934), 50 T. L. R. 581, 584; Lord Buckmaster in *Lockhart v. Harrison* (1928), 139 L. T. 521, 523.

make such an order, and examples of it in the reports are rare indeed (g). §§ 78, 79.

§ 79. Innuendo.

Innuendo.

In defamation words may be (i) so plain that no further explanation of them is needed, or (ii) doubtful in meaning, in which case what is called an “innuendo” is required.

As to (i) the plaintiff need give no interpretation of such words either in his statement of claim or in his evidence. To call a man “Judas” is usually given as an example. But it must be remembered that, as Lord Blackburn said, “there are no words so plain that they may not be published with reference to such circumstances, and to such persons knowing these circumstances, as to convey a meaning very different from that which would be understood from the same words used under different circumstances” (h). This makes it hazardous to say dogmatically of any epithet that it is, for all time and in all places and circumstances, clearly defamatory. “Ananias” is a common description of a liar, but as applied to a newspaper it may mean only that the journal has made a silly blunder in giving false news, not that it is deliberately lying (i). And Judas may possibly be no more an infallible synonym for a traitor than Ananias is for a liar, or Cain for a murderer. Again, in *Hoare v. Silverlock* (1848) (k), where it was stated of the plaintiff that “her warmest friends . . . had realised the fable of the Frozen Snake”, the Court held that the meaning of these words was obvious; but it may be questioned whether at the present day the man on the Clapham omnibus is as well instructed in Æsop’s “Fables” as his ancestor was in 1848.

As to (ii) where the words are not on the face of them defamatory an innuendo is necessary. This is a statement by the plaintiff of the meaning which he himself attributes to them, and he will have to satisfy (a) the Judge that the words are capable of being understood by reasonable persons (l)

Functions of
judge and
jury.

(g) *Broome v. Agar* (1928), 138 L. T. 698.

(h) *Capital and Counties Bank v. Henty* (1882), 7 App. Cas. 741, 771.

(i) *Australian Newspaper Co., Ltd. v. Bennett*, [1894] A. C. 284, 287—288.

(k) 13 Q. B. 624.

(l) It is, as we have already stated (*ante*, p. 242), not enough that persons in one section only of the community might so understand them unless they are reasonable in so doing; in other words, the test to apply is reasonableness, whether the readers or audiences are few or many, expert or

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in that sense, and (b) the jury that they were so understood by reasonable people (m), or that reasonable people would have a tendency to understand them in that sense. Thus the Judge decides whether they *can* have that meaning, the jury whether they *did* have it (n). If the words are fairly capable of several meanings, some defamatory and some innocent, the case should be left to the jury (o). But where the statement has only one reasonable meaning which is harmless, the Court will not torture into it a defamatory meaning which no doubt is possible, but which can be reached only by inventing facts which are not disclosed and are in fact non-existent. Thus in *Sim v. Stretch* (p), the plaintiff's housemaid re-entered the service of the defendant, who thereupon telegraphed to the plaintiff "Edith [the housemaid] has resumed service with us to-day. Please send her possessions and the money you borrowed, also her wages". The plaintiff urged that this meant that the plaintiff was in pecuniary difficulties and had consequently borrowed money from the housemaid, that he had failed to pay her wages and was a person to whom no one ought to give any credit. The House of Lords declined to take this view. It is such a usual domestic occurrence for small sums to be lent by servants and for the debt to be left outstanding for some days that no discredit can reasonably be imputed to an employer who does no more than this. If the amount had been large and owing for a long time it might have constituted such an imputation, but that was not the fact here, and counsel's attempt to interpret the telegram in

inexpert. *Tolley v. Fry & Sons, Ltd.*, [1930] 1 K. B. 467, 479; [1931] A. C. 333, 339.

(m) It does not follow that, because plaintiff's witnesses say that they attached a particular meaning to the words, the plaintiff has established his case, for their interpretation may be an unreasonable one: *Frost v. London Joint Stock Bank, Ltd.* (1906), 22 T. L. R. 760; Bramwell, B., in *Barnett v. Allen* (1858), 3 H. & N. 376, 380. But the fact that several persons did understand the words in the alleged sense is a strong argument that the meaning was a reasonable one: Denman, J., in *Capital and Counties Bank, Ltd. v. Henty* (1880), 5 C. P. D. 514, 530.

(n) The now extinct colloquium (Odgers, *op. cit.*, 116—117), required an immense amount of explanatory detail to be set out in the plaintiff's pleadings; otherwise he could give no evidence of it at the trial. The Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 61, made all this needless, though of course it did not dispense with the requirement of an innuendo.

(o) Scrutton, L.J., in *Cassidy v. Daily Mirror Newspapers, Ltd.*, [1929] 2 K. B. 331, 339—340; du Parc, L.J., in *Newstead v. London Express Newspaper, Ltd.*, [1940] 1 K. B. 377, 396; *English, etc., Society, Ltd. v. Odhams Press, Ltd.*, [1940] 1 K. B. 440.

(p) [1936] 2 A. E. R. 1237, 1241. See 52 L. Q. R. (1936), 453—454.

this way was merely an unsuccessful effort to convert a meaning which was barely possible into one that was reasonably probable (q).

An innuendo may be required for terms *prima facie* unintelligible, e.g., untranslated Chinese; or for ambiguous expressions, e.g., "Smith drinks"; or for apparently innocent utterances, e.g., "He has set his own premises on fire" (r); or where the statement is an ironical one. Other examples in which an innuendo has been required are calling a man "a lame duck" (meaning thereby that he is a defaulter on his stockbroking contracts) (s), or "a welsher" (t), or "a blackleg", or "a blacksheep" (u).

The innuendo may show that the sting of the defamation lay not so much in what was said or written as in the facts attending publication. In *Tolley v. Fry & Sons, Ltd.* (a), the plaintiff, a famous amateur golfer, was caricatured by the defendants, without his knowledge or consent, in an advertisement of their chocolate which depicted him with a packet of it protruding from his pocket. A caddy was represented with him, who also had a packet of chocolate the excellence of which he likened, in some doggerel verse, to the excellence of the plaintiff's drive. The plaintiff alleged in his innuendo that the defendants thereby meant that the plaintiff had agreed to let his portrait be exhibited for advertisement, that he had done this for gain, and that he had thus prostituted his reputation as an amateur golfer. The House of Lords held that the caricature, as explained by the evidence, was capable of being thus construed; for golfers testified that any amateur golfer who assented to such advertisement might be called upon to resign his membership of any reputable club, and it also appeared from correspondence between the defendants and their advertising agents that they were quite alive to the possible effect of the advertisement on the plaintiff's amateur status.

(q) At p. 1241, Lord Atkin cited Brett, L.J., in *Capital and Counties Bank v. Henty* (1880), 5 C. P. D. 514, 541: "It seems to me unreasonable that when there are a number of good interpretations, the only bad one should be seized upon to give a defamatory sense to the document."

(r) *Sweetapple v. Jesse* (1833), 5 B. & Ad. 27.

(s) *Morris v. Langdale* (1800), 2 Bos. & P. 284.

(t) *Blackman v. Bryant* (1872), 27 L. T. 491.

(u) *M'Gregor v. Gregory* (1843), 11 M. & W. 287; *O'Brien v. Clement* (1846), 16 M. & W. 159.

(a) [1931] A. C. 333 (W. Cases, 112); 47 L. Q. R. 326.

§ 79.

Knowledge of
defendant
immaterial.

It is immaterial whether the defendant knew, or did not know, of external facts which turn a presumptively innocent statement into a defamatory one. He must take the risk of that and he is liable either way provided the defamatory meaning which is alleged could reasonably have been put upon the words. In *Cassidy v. Daily Mirror Newspapers, Ltd.* (b). the defendants published in their newspaper a photograph of one, C., and Miss X together with the words, "Mr. C., the race-horse owner, and Miss X, whose engagement has been announced". Mrs. C. was, and was known among her acquaintances, as the lawful wife of C., although she and C. were not living together. The information on which the defendants based their statement was derived from C. alone, and they had made no effort to verify it from any other source. Mrs. C. sued them for libel, the innuendo being that C. was not her husband but lived with her in immoral cohabitation. A majority of the Court of Appeal held that the innuendo was established and, the jury having found that the publication conveyed to reasonable persons an aspersion on the plaintiff's moral character, that she was entitled to damages (c).

Innuendo
from
locality.

Mere juxtaposition to noxious matter may make an otherwise innocent representation defamatory. In *Monson v. Tussauds, Ltd.* (d), the plaintiff had been tried for a murder alleged to have been committed at Ardlamont in Scotland and a Scottish jury had returned a verdict of "Not proven". The defendants, who kept a waxwork exhibition, put a wax model of the plaintiff in one of the exhibition rooms in company with models of three other persons all of whom had been convicted of, or were wanted for, crime. Other objects of interest in the room were an effigy of Napoleon I and relics of the Duke of Wellington. The charge for admission to this room was 6d. and from it free access was obtainable to the "Chamber of Horrors" which was peopled principally by waxworks of murderers and other malefactors and which contained a representation of the place where the alleged murder was committed, labelled "Ardlamont Mystery: Scene of the Tragedy". The Queen's Bench Division held that this was clearly a libel and

(b) [1929] 2 K. B. 331.

(c) Followed in *Hough v. London Express Newspaper, Ltd.*, [1940] 2 K. B. 507, where it was pointed out that it need not be proved that reasonable persons actually did so understand the words; it is enough that they might do so.

(d) [1894] 1 Q. B. 671.

they granted an interlocutory injunction pending trial of the action for damages. The Court of Appeal did not regard the case as sufficiently clear for an interlocutory injunction (which in libel is allowed only in extreme cases), but they did not deny that a jury might find the matter to be defamatory.

§§ 79, 80.

The functions of an innuendo are not exhausted in the explanation of words. They extend, as will be seen in the next section, to identification of the plaintiff (*e*).

§ 80. The words must refer to the plaintiff.

Words
must refer
to plaintiff.

If the plaintiff is mentioned by name, there is usually no difficulty about this, but even here an innuendo may be necessary if another person happens to have the same name. In *Hulton & Co. v. Jones* (*f*), H. & Co. were newspaper proprietors and published in their paper a humorous account of a motor festival at Dieppe in which imputations were cast on the morals of one, Artemus Jones, a churchwarden at Peckham. This person was intended to be, and was believed by the writer of the article and the editor of the paper to be, purely fictitious. In fact there was a barrister named Artemus Jones, who was not a churchwarden, did not live at Peckham and had taken no part in the Dieppe festival. He sued H. & Co. for libel, and friends of his swore that they believed that the article referred to him. The jury returned a verdict for the plaintiff and the House of Lords refused to disturb this. They held that if reasonable people would think the language to be defamatory of the plaintiff it was immaterial that the defendants did not intend to defame him. In *Newstead v. London Express Newspaper, Ltd.*, the Court of Appeal carried *Hulton v. Jones* farther in two directions (*g*). They held that (1) the principle applies where the statement truly relates to a real person, A, and is mistakenly but reasonably thought to refer to another real person, B; (2) absence of negligence on the defendant's part is relevant only in the sense that it may be considered by the jury in determining whether reasonable people would regard the statement as

(*e*) In *Garbett v. Hazell, etc., Ltd.*, [1943] 2 A. E. R. 359, the deliberate and offensive juxtaposition of two pictures in a magazine, one of the plaintiff, the other of a nude woman, was held to be libellous.

(*f*) [1910] A. C. 20 (W. Cases, 114). Applied by Scrutton and Slesser, L.JJ., in *Yousoupoff v. Metro-Goldwyn-Mayer Pictures, Ltd.* (1934), 50 T. L. R. 581, 582—583, 587.

(*g*) [1940] 1 K. B. 377. Cf. *Shaw v. London Express Newspaper, Ltd.* (1925), 41 T. L. R. 475.

§ 80.

referring to the plaintiff; otherwise it is no defence. In *Newstead's Case*, the statement was that "Harold Newstead, thirty-year-old Camberwell man", had been convicted of bigamy. This was true of a Camberwell barman of that name, but it was untrue of the plaintiff, Harold Newstead, aged about thirty, who assisted his father in a hairdressing business in Camberwell. The defendants were held liable. These decisions may appear to be hard for writers of fiction, whether in journals or novels, or rather for newspaper proprietors and for publishers, for it is usually they who have to bear the brunt of an action of libel, because they are worth suing. They are at the mercy of coincidence in the sense that any unscrupulous person whose name happens to be identical with that of a fictitious character can threaten them with an action for libel, although he has not suffered a tittle of damage; and, however confident the defendants may be of a favourable result, what they would prefer is freedom from litigation rather than success in it (h).

Class must
be identi-
fiable.

The law as to defamation of a class of persons was reviewed by the House of Lords in *Knupffer v. London Express Newspaper, Ltd.* (i), and the principles there laid down may be stated thus. The primary question (as in all actions for defamation) is whether the words were published of and concerning the plaintiff—in this case a member of a class referred to by the defendant. In order to answer this question, (1) the Judge must decide, as a matter of law, whether, on the evidence, the words can reasonably be construed as referring to the plaintiff (k); if he holds that they can, then (2) the jury (or, if there is no jury, the Judge sitting as a judge of fact) must decide whether reasonable people, who knew the plaintiff, thought that the words referred to him. Thus, where the words are published of a class of persons and there is nothing to show which one was meant, none can sue.

(h) See, too, Sir William Holdsworth in 57 L. Q. R. 74—84. In 1927, Lord Gorell introduced into the House of Lords a "Law of Libel Amendment" Bill for the purpose of correcting this abuse. The Bill was read a second time and was referred to a Select Committee; but it never became law. A Committee appointed by the Lord Chancellor in 1939 to consider amendment of the law of libel now has the matter in hand.

(i) [1944] A. C. 116.

(k) "In deciding this question the size of the class, the generality of the charge and the extravagance of the accusation may all be elements to be taken into consideration, but none of them is conclusive. Each case must be considered according to its own circumstances". Lord Porter, *ibid.* 124.

What the Psalmist said in haste of all men was not defamatory even if it had been untrue. Nor, if A says that "all lawyers are thieves", can any one lawyer sue him unless there is something in addition which points to him in particular (l). Moreover, an innuendo will not help the plaintiff to establish that a vague statement which accuses no particular person is defamatory. "An innuendo cannot make the person certain who was uncertain before" (m). If, however, the words refer to each and every member of a class, each or all can sue. *Id certum est, quod certum reddi potest*. Thus seventeen men were indicted for conspiracy, and A said, "These defendants are those that helped to murder Henry Farrer". Held, each of the seventeen could bring a separate action against A (n). Another possible case is where the words, on the face of them, apply only to a class and yet were in fact aimed at one individual only in the class. He can sue if he can prove this reference to himself, and so of course can every other member of the class if he can prove that reasonable people would think that he were indicated, although the defendant never intended this. In *Le Fanu v. Malcolmson* (o), a newspaper article stated that cruelties were practised "in some of the Irish factories", and the plaintiff, who showed that the imputation was against his factory, was held entitled to recover. Contrast with this *Knupffer's Case* (supra). The defendants published an article defaming Mlado Russ, an association of Russian political refugees which had a large membership in some countries, but only twenty-four members in the United Kingdom of whom K, the plaintiff, was the active head. The article imputed Fascism to "a minute body . . . established in France and the United States", but it made no mention of the branch in the United Kingdom, nor of K. The House of Lords held that the defendants were not liable, for K had not satisfied even the first requisite (see (l), supra). Although witnesses for K testified that they thought the article referred to him, that was not because of anything in the article, but only because they happened to know that K was the leading member of the association in England.

(l) Willes, J., in *Eastwood v. Holmes* (c. 1858), 1 F. & F. 347, 349.

(m) *James v. Rutleah* (1599), 4 Rep. 17 a, 17 b.

(n) *Foxcroft v. Lacy* (1613), Hobart 89.

(o) (1848), 1 H. L. C. 637.

§§ 80, 81.

Just as an innuendo may mark out the plaintiff as one member of a class, so it may show that the description of a single person, real or fictitious, refers to him. Thus in *J'Anson v. Stuart* (p), a newspaper paragraph stated, "This diabolical character, like Polyphemus the man-eater, has but one eye, and is well known to all persons acquainted with the name of a certain noble circumnavigator". It was clear that the plaintiff was the person indicated on his giving proof that he had one eye and bore a name similar to that of Anson, the famous admiral.

§ 81. The words must be published.

Publication.

Publication is the communication of the words to at least one other person than the person defamed. Communication to the plaintiff himself is not enough, for defamation is an injury to one's reputation, and reputation is what other people think of a man, and not his own opinion of himself (q).

The statement must be intelligible to the recipient of it. There is no publication of it if it is in a foreign language which he does not understand, or if he is too deaf to hear it, or too blind to read it, or if he did not realise that it referred to the plaintiff (r). Nor is there any publication if a person gets to know of the statement through his own wrongful act which is destitute of any authority on the part of the defendant and which is not decisively caused by the defendant's negligence. In *Huth v. Huth* (s), the defamatory matter was in an unsealed letter sent through the post and the letter was opened and read by an inquisitive butler. As it was no part of his duty to do this, there was no publication for which the defendant was responsible. No doubt the defendant did an unwise thing in not sealing the envelope, but the behaviour of the butler was not a direct consequence of his sending the letter. But there would have been a publication by the defendant if a Post Office official had opened the letter in the

(p) (1787), 1 T. R. 748.

(q) In criminal libel publication to the prosecutor alone suffices, but then the reason why libel is a crime is not merely because it assails the reputation, but also because it tends to a breach of the peace. In Scots law, publication to persons other than the pursuer is unnecessary even in civil proceedings, but that is because defamation is regarded by that system as an injury to a man's feelings as well as to his reputation: *Mackay v. M'Cankie* (1883), 10 Rettie 537.

(r) *Sadgrove v. Hole*, [1901] 2 K. B. 1.

(s) [1915] 3 K. B. 32 (W. Cascs, 117).

course of his duty, *e.g.*, to see whether it complied with the regulations as to documents which have the privilege of being put in unsealed envelopes; or if the letter, whether sealed or unsealed, had not been marked "private" and had been opened and read by the plaintiffs' correspondence clerk in the course of his duty (t). The Court were much pressed with the argument that this letter was in exactly the same position as a postcard or a telegram. The legal presumption is that these are published on being sent through the Post Office without any proof that any one did in fact read them. It might be urged that a third person is no more entitled to read a postcard than an unsealed letter, and that the publication is due to the wrongful act of the third person just as much in the one case as in the other. But that is not the real basis of the distinction. What it really turns upon is practical necessity in the law of evidence. As the Court of Appeal pointed out in *Huth v. Huth*, the presumption as to postcards is based on the fact that it is practically impossible to *prove* that any third person did read it, although it is highly probable that some one did. Moreover, the presumption is a rebuttable one, although it is very difficult to conceive that such rebutting evidence could be given (u). Finally, merely reading another person's correspondence may be a dishonourable act, but it is not an unlawful one, whereas unauthorised opening of any letter, sealed or unsealed, is in itself a trespass to a chattel, whether the letter be read or not; on the other hand, it is possible to read a postcard without touching it.

Communication of defamatory matter by a husband to his wife, or *vice versa*, is not a publication, for what passes between them is protected on the ground that any other rule "might lead to disastrous results to social life" (a). But communication by a third party to one spouse of matter defamatory of the other spouse is publication; husband and wife are still, for some purposes of the law, one person, but not "for the purpose of having the honour and feelings of the husband assailed and injured by acts done or communications made to the wife" (b).

Husband
and wife.

Every repetition of defamatory words is a fresh publication

Repetition.

(t) [1915] 3 K. B. 40, 43—44; *Delacroix v. Thevenot* (1817), 2 Stark. 63.

(u) Lord Reading, C.J., *ibid.*, 39—40.

(a) *Wennhak v. Morgan* (1868), 20 Q. B. D. 635, 639.

(b) *Wenman v. Ash* (1853), 13 C. B. 836, 844—845.

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and creates a fresh cause of action (c). This is strikingly illustrated by a libel in a newspaper. Not only is the writer of the article liable, but so is the editor, the printer, the publisher, the proprietor of the paper, and (subject to what is said below) even the newsagent or the boy who vends it in the street. But there are qualifications of this. It is true that absence of knowledge that the matter is defamatory or of intention to injure the plaintiff is, by itself, no excuse for the defendant, and it is equally true that it is a very lame defence to plead, "I tell the tale as 'twas told to me", for it is usually by idle repetition that lies are propagated. But, on the other hand, a person is not responsible for the publication of a statement which is put in circulation by one who is not his agent, express or implied.

(i) By mere distributor.

So much is clear, but beyond this lies the question, "Is a person liable who has not been negligent with respect to publication?" The answer to this is neither easy to ascertain nor entirely self-consistent. The modern law is to be found chiefly in cases connected with newspapers and printed books. Those who are concerned with the mere mechanical distribution of such matter—newsagents, circulating libraries, book-sellers (and presumably bookbinders)—are in a safer position than those who are primarily concerned with its production—authors, newspaper proprietors, publishers, printers, editors. Any one of the former is presumptively liable, but he has a good defence if he can prove (i) that he was innocent of any knowledge of the libel contained in the work disseminated by him; and (ii) that there was nothing in the work or in the circumstances in which it came to him or was disseminated by him which ought to have led him to suppose that it contained a libel; and (iii) that when the work was disseminated by him, it was not by any negligence on his part that he did not know that it contained the libel. These requisites, which were laid down by Romer, L.J., in *Vizetelly v. Mudie's Select Library, Ltd.* (d), were adopted by Scrutton, L.J., in *Bottomley v. Woolworth & Co.* (e); but in the later case of *Sun Life Assurance Co. of Canada v. W. H. Smith & Son, Ltd.*, the learned Lord Justice thought that (ii) and (iii) might be simplified by combining them in the single question,

(c) As to joinder of actions, see Odgers, *op. cit.*, 484—489.

(d) [1900] 2 Q. B. 170, 180.

(e) (1932), 48 T. L. R. 521.

“Ought the defendant to have known that the matter was defamatory; i.e., was it due to his negligence in conducting his business that he did not know?” (f).

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In *Vizetelly's Case*, the proprietors of a circulating library were held liable because they had used no means for ascertaining whether their books contained libels and had overlooked a publisher's circular requesting the return of copies of this particular book. Contrast with this *Martin v. Trustees of British Museum* (g), where the defendants were held not liable for allowing readers in the British Museum to see books containing libellous matter, there being no negligence on the part of the defendants (h); and later cases in which judgments were given in favour of newsagents and booksellers who satisfied the three conditions stated above (i). The law could scarcely be otherwise, for if it were, we should be a short step from holding that a railway company ought to be liable for transporting bundles of newspapers in its vans. “A newspaper is not like a fire; a man may carry it about without being bound to suppose that it is likely to do an injury” (k).

But a sterner view is taken of the responsibilities of those who produce printed matter as distinct from disseminating it. The proprietor of a newspaper (with whom must be included its editor, printer and publisher) is liable even if he were not negligent (l) in embodying the libel in his journal. He can, of course, set up any other defence appropriate to defamation—truth, fair comment, privilege; or he can establish a general negation of liability, like *volenti non fit injuria*; but he cannot successfully contend that he was not negligent except for the purpose of mitigating damages.

(ii) By producer of print.

The law may seem to be severe, but it must be borne in mind that much greater currency is given to the matter which is multiplied by journals than to spoken (except broadcasted) or written statements. The newspaper proprietor's liability depends, like that of any other employer, on vicarious

(f) (1934), 150 L. T. 211.

(g) (1894), 10 T. L. R. 338.

(h) What is the position of the owner of a private library who lends a book to a friend, or who permits a guest to use the library; or of a railway passenger who lends a fellow-traveller a magazine? Presumably, the same as that of a newsagent or bookseller.

(i) *Emmens v. Pottle* (1885), 16 Q. B. D. 354; *Weldon v. Times Book Club Co., Ltd.* (1911), 28 T. L. R. 143; *Bottomley v. Woolworth & Co., Ltd.* (1932), 48 T. L. R. 521.

(k) Bowen, L.J., in 16 Q. B. D. at p. 358.

(l) *Cassidy's Case* and *Newstead's Case*, *ante*, pp. 263, 264.

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responsibility. The editor is his agent and the printer and publisher are either his agents or, if they are independent contractors, they are liable on their own account.

As to propagation of defamatory matter by the ordinary person, he is not liable if he can disprove negligence. He will be liable if he leaves his correspondence about, if he inadvertently puts letters in the wrong envelopes, or if he speaks too loudly; but not if a thief or other unauthorised person puts a letter of his in circulation or reads it himself. What constitutes negligence must be a question of fact in each case (*m*).

If the defamatory matter is imposed upon the defendant's property by the unauthorised act of a third person, is the defendant bound to remove the matter when he becomes aware of it and knows, or has reasonable grounds for suspecting, that it is defamatory? Certainly he must remove it where he can do so without any difficulty or expense: *e.g.*, if it be a typed document affixed to a wall of his house, for otherwise he is a party to publication: such was the view of the Court of Appeal in *Byrne v. Deane* (*n*). But what if it be an inscription cut into the stonework of his house with a chisel or burned into it by an acid? Upon this point there is no English decision, but Greene, L.J., in *Byrne's Case* was of opinion *obiter* that where removal would involve very great trouble and expense the defendant would not be liable for non-removal (*o*). With all respect, it is urged that this is a case where one of two innocent parties must suffer and that it ought to be the defendant because the mischief to the plaintiff in having lies about him inscribed on what may be a *monumentum aere perennius* is greater than that to the defendant in having to erase them. And how does the case differ from that of a bookseller who must withdraw from circulation all copies of a book in which he discovers a libel, however heavy the financial loss to him may be? (*p*).

(*m*) Gatlley, *op. cit.*, 98—102. Kenny, *Cases on Tort* (5th ed. 1928), 305, says that a document blown off my desk into your garden is not published; but this is too jejune and much more would have to be known about the circumstances to decide this. If I leave the document near an open window and a light breeze blows it away, surely that is negligence on my part.

(*n*) [1937] 1 K. B. 818.

(*o*) *Ibid.*, 838.

(*p*) *Vizetelly v. Mudie's Select Library, Ltd.*, [1900] 2 Q. B. 170. Cf. 83 *Law Journal*, 264.

If the plaintiff expressly or impliedly assents to the publication of matter which is true on the face of it, the defendant is not liable; and this is so even if it appears that some persons may interpret the statement in a sense much more prejudicial to the plaintiff than is warranted by the plain meaning of the words. After all, that is a possibility which the plaintiff ought to have considered before he assented to publication, and he cannot be heard to complain that words which, in their ordinary meaning, are true have been construed by third parties in a sense contemplated neither by him nor by the defendant. In *Cookson v. Harewood* (q), the plaintiff sued the defendants for libel because they had published a true statement that the plaintiff had been warned off all pony racing courses under their control. The plaintiff had submitted to the rules of the Pony Turf Club which the defendants controlled, and one of these rules was that the stewards of the Club might, in their absolute discretion, warn off any person. Warning off might be occasioned by mere negligence of the delinquent as well as by less reputable causes. The plaintiff contended that if, by innuendo, the jury interpreted the statement as meaning that he had been guilty of corrupt and fraudulent practices, then the defendants were liable. But the Court of Appeal held that this argument was unsound. Scrutton, L.J., said (r), "It has seemed to me all through this case that these questions about innuendoes are quite beside the mark. If you get a true statement and an authority to publish the true statement, it does not matter in the least what people will understand it to mean. The plaintiff had submitted to the jurisdiction [of the Pony Turf Club]. The stewards have authority to publish the decision in the Racing Calendar, and if it is defamatory, it does not matter in the slightest what exact shade of meaning you are to put upon the obviously defamatory statement" (s). Judgment for the defendants was affirmed.

It should be observed that this defence, which has also been regarded as an instance of *volenti non fit injuria* (t), has

§ 81.

Assent to
publication.

(q) [1932] 2 K. B. 478, note.

(r) [1932] 2 K. B. 482.

(s) Approved by Lord Hanworth, M.R., and Slessor, L.J., in *Chapman v. Ellesmere*, [1932] 2 K. B. 431, 451, 464, and *semble* by the Court of Appeal in *Pritchard v. Greyhound Racing Association, Ltd.* (1933), 176 L. T. Journal, 393; (1934) 177 L. T. Journal, 90.

(t) Slessor, L.J., in *Chapman v. Ellesmere*, [1932] 2 K. B. at p. 463; *contra*, Romer, L.J., at p. 474.

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nothing whatever to do with the defence of qualified privilege. Emphasis of this is necessary because some expressions in *Chapman v. Ellesmere* might give the contrary impression (u). As will be seen, when we come to deal with it, privilege, if it is established, negatives liability for any statement whether it is *prima facie* untrue or is untrue only by innuendo, and whether consent has been given to the publication or not; or, to put it in another way, privilege, truth and consent are three entirely separate defences. Another distinction between privilege and consent to publication is this. It is for the law to say whether privilege in any form exists. Parties cannot by mere agreement create it. But they can, as they did in *Cookson v. Harewood*, agree that one of them shall be entitled to publish the truth about the other, and such an agreement will exclude liability for defamatory innuendoes which may be put upon a correct, but bald, statement of facts.

Defences to
defamation.

§ 82. Defences to defamation.

These are:—

- (i) Justification (or truth).
- (ii) Fair comment.
- (iii) Privilege which may be (a) absolute, or (b) qualified.

Justification.

§ 83. Justification (or truth).

The plaintiff need not prove that the statement is false, for the law presumes that in his favour. But the defendant can plead “justification” (the technical name for truth here) and if he can establish it by evidence, he has a good defence. It is not that the law has any special relish for the indiscriminate infliction of truth on other people, but defamation is an injury to a man’s reputation and if people think the worse of him when they hear the truth about him, that merely shows that his reputation has been reduced to its proper level. At the same time justification is a dangerous plea if it is the only one which the defendant decides to adopt, for if he fails in it the jury are likely to regard his conduct as wanton and to return a verdict for heavier damages (a).

Must be
true in
substance.

It is not enough to prove that part of the statement is true, though, as will be seen shortly, it is possible to sever part of it and to prove truth as to that. Where there is no such

(u) [1932] 2 K. B. at pp. 450—451, 468.

(a) *Simpson v. Robinson* (1848), 12 Q. B. 511.

severance "the justification must be as broad as the charge, and must justify the precise charge" (b). Thus, a newspaper paragraph was headed, "How lawyer B treats his clients", but the paragraph itself gave an account of how only one client had been badly treated, and this was held insufficient to justify the heading (c). Provided, however, that the statement as a whole is proved to be substantially true, that is a good justification. Whether an inaccuracy is sufficiently material to negative justification is a question of fact for the jury. In *Alexander v. North-Eastern Ry.* (d), the plaintiff was alleged to have been fined for an offence against the defendants' by-laws with an alternative of three weeks' imprisonment. In fact, the alternative was two weeks' imprisonment. The plaintiff contended that, as a matter of law, this *must* be libellous, the defendants that it *could not* be libellous. The Court held that neither view was correct, because it was for the jury to decide whether the discrepancy between two and three weeks was material.

Mere general abuse and invective which add nothing to the main charge need not be justified, *e.g.*, stigmatising as "scamps" and "rascals" pill-manufacturers whom you have already truthfully described as practising wholesale poisoning and homicidal tricks (e). But it was something more than mere abuse to say of an officer who had killed a man in a duel that he had spent the whole night preceding the duel in practising pistol firing, for that was imputing to him atrocious conduct revolting to the laws of honour which governed duelling, and the imputation was not justified either by the fact that he had been tried for the murder of the slain man or by the fact that these "laws" are no defence to a criminal charge (f).

Where the defendant has merely reproduced a defamatory statement it is not enough to prove that he has repeated with complete accuracy what was reported to him. He must go farther and prove that the statement itself is true. If I say to you, "Smith told me that Brown swindled his creditors", I can justify this only by proof that Brown did swindle his

(b) Odgers, *op. cit.*, 149.

(c) *Bishop v. Latimer* (1861), 4 L. T. 775.

(d) (1865), 6 B. & S. 340; 34 L. J. Q. B. 152.

(e) *Morrison v. Harmer* (1837), 3 Bing. N. C. 759. Cited by Viscount Cave, L.C., in *Sutherland v. Stopes*, [1925] A. C. 47, 59.

(f) *Helsham v. Blackwood* (1851), 11 C. B. 111.

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creditors; it is idle to show that Smith in fact gave me the information.

Innuendo.

If words are held to be capable of an innuendo put upon them by the plaintiff, then the defendant must, if he wishes to justify, prove the truth of the meaning raised by the innuendo just as much as if the words were plain in their signification (*g*). If you describe a man as "a felon editor", you do not justify this by showing that he has served a sentence on a conviction for felony, for, as the sentence has expired he is no longer a felon (*h*). But, as Greer, L.J., has said (*i*), "any one who knows that a man has been convicted of larceny at a criminal trial before a Court of competent jurisdiction is entitled to say without being sued for slander or libel that that man has, in fact, been convicted".

The defendant may justify part of the statement if it is severable from the rest without embarrassing the plaintiff in his pleading. As to the rest, he may plead privilege if that plea is applicable, or he may leave it unjustified with, or without, an apology (*k*).

The nature of the "rolled-up" plea will be explained under "Fair comment".

Fair
comment.

§ 84. Fair comment.

It is a defence to an action for defamation that the statement is a fair comment on a matter of public interest.

Honest criticism ought to be, and is, recognised in any

(*g*) Salmond, Torts, § 105 (6), suggests that there are *dicta* of Greer, L.J., the other way. But all that the learned Lord Justice said in *Cookson v. Harwood*, [1932] 2 K. B. 478, n., 485, was: "It would, in my judgment, be an extraordinary result of the law of libel and slander that if you said that a properly constituted tribunal had found a man guilty of some wrongful act you could be sued for libel unless you could prove that that properly constituted tribunal had rightly decided that he was guilty." This is certainly correct of tribunals which are strictly Law Courts, and also of the decisions of domestic tribunals (*e.g.*, club committees), provided the person affected by them has given his assent to the publication. Note that while it is possible thus to establish the defence of truth, it does not follow that the alternative defence of privilege, which attaches to the reports of proceedings of the ordinary Law Courts, applies also to reports of proceedings of these domestic tribunals: Romer, L.J., in *Chapman v. Ellesmere*, [1932] 2 K. B. 431, 475. Even with respect to reports of Law Court proceedings, if the defendant prefers to plead justification instead of privilege, he cannot succeed unless he can prove the truth of any innuendo which the Court holds to be rightly attached to the statement.

(*h*) *Leyman v. Latimer* (1877), 3 Ex. D. 15, 352.

(*i*) *Cookson v. Harwood*, [1932] 2 K. B. at p. 485.

(*k*) *Fleming v. Dollar* (1889), 23 Q. B. D. 388; *Davis v. Billing* (1891), 8 T. L. R. 58.

civilised system of law as indispensable to the efficient working of any public institution or office, and as salutary for private persons who make themselves or their work the object of public interest. "Others abide our question, thou art free" may be true of Shakespeare in literature. In law it is not true of him or of anybody else.

The defence has been recognised for a long time in English law (l), but so far as comment on the acts of government officials or ministers goes, it is of comparatively modern development, for little more than a century ago governments, when they were not so sure of the obedience of subjects, were quick to resent adverse criticism of their conduct (m). On the other hand, criticism of literature produced by private persons was far more vitriolic in earlier times than it is now, because it was then felt that the proper way of dealing with it was not to resort to the law Courts but to meet it with something in print yet more stinging—just as men preferred the sword to litigation in order to vindicate attacks on their honour, so they were expected to retort to the pen with the pen (n).

The requisites of fair comment are:—

(i) *The matter commented on must be of public interest.*—

This includes many well-recognised topics in particular, and in general "anything which may fairly be said to invite comment, or challenge public attention" (o). It ranges from the behaviour of a prime minister or of a sanitary authority to the conduct of a flower-show. It includes the conduct of every public man and every public institution. "A clergyman with his flock, an admiral with his fleet, a general with his army, and a judge with his jury . . . are all . . . the subjects for public discussion, . . . because whoever fills a public position renders himself . . . open to public discussion, and if any part of his public acts is wrong, he must accept the attack as a necessary though unpleasant circumstance attaching to his position" (p). Such people have publicity thrust upon them; others, like novelists, dramatists and writers of text-books, achieve it. Any author who publishes

Requisites :
(i) Matter must be of public interest.

(l) *E.g.*, *Dibdin v. Swan* (1793), 1 Esp. 28.

(m) *Wason v. Walter* (1868), L. R. 4 Q. B. 73, 93—94.

(n) Bower, *op. cit.*, App. III. Messrs. Pott and Slurk, the rival editors in "Pickwick Papers", are not much exaggerated as types of that period.

(o) Gatlley, *op. cit.* 400.

(p) *Bramwell, B.*, in *Kelly v. Sherlock* (1866), L. R. 1 Q. B. 686, 689.

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a book, any artist who exhibits a picture, any tradesman who puffs his own wares, any discontented person who airs his grievances in public, invites criticism (q).

It is for the Judge to decide whether the matter is, or is not of public interest (r).

(ii) Must express opinion, not assert fact

(ii) *It must be an expression of opinion and not an assertion of fact.*—It is not always easy to draw this distinction. To describe the line,

“A Mr. Wilkinson, a clergyman”,

as the worst in English poetry is obviously comment, for verification of it as a fact is impossible. But some cases are much nearer than that to the border-line between comment and fact. In *Dakhyl v. Labouchere* (s) the plaintiff described himself as “a specialist for the treatment of deafness, ear, nose, and throat diseases”. The defendant described him as “a quack of the rankest species”. Was this comment or an allegation of fact? It was held by the House of Lords that it might be comment. Again, calling a man a fornicator or a swindler looks like a statement of fact, but what is calling him “immoral” or “a sinner”? Are immorality and sin facts or matters of opinion? To this there is no dogmatic answer. Every statement must be taken on its merits. The very same words may be one or the other according to the context. To say that “A is a disgrace to human nature”, is an allegation of fact. But if the words were, “A murdered his father and is therefore a disgrace to human nature”, the latter words are plainly a comment on the former (t). Hence a critic should take pains to keep his facts and the comment upon them severable from one another, for if it is not reasonably clear that the matter purports to be comment, he cannot plead fair comment as a defence (u).

Comment and justification.

The relation of justification (or truth) to fair comment must be carefully noted. We start with two propositions. First, justification and fair comment are totally independent defences; the defendant can, and often does, plead them alternatively, but they are quite different from each other.

(q) For other examples, see Odgers, *op. cit.*, 169—180; Gatley, *op. cit.*, 390—402.

(r) *Per Lopes, L.J.*, in *South Hetton Coal Co., Ltd. v. N.-E. News Association*, [1894] 1 Q. B. 133, 141.

(s) [1908] 2 K. B. 325, note.

(t) Gatley, *op. cit.*, 373.

(u) *Fletcher-Moulton, L.J.*, in *Hunt v. Star Newspaper Co., Ltd.*, [1908] 2 K. B. 309, 320.

Secondly, it is impossible for the defendant to succeed in a plea of fair comment unless he is commenting on facts, *i.e.*, on what is "true" in the qualified sense of that word stated below. It is obvious that no comment can be fair if it is upon something which the defendant has invented or distorted (*a*). And to that extent the defendant must prove the truth of facts, unless that much is conceded in his favour by the plaintiff; but his defence is still fair comment and not justification. But when it is said that the facts must be true, this does not signify that, if the comment is upon the statement of another person, such statement must always be proved to be true (*b*), for in some cases such proof is impossible. If A publishes a statement that "There are men on the planet Mars" and B criticises this allegation as unfounded, B's criticism may well be fair comment, for it is based on fact in the sense that it refers to an assertion actually made by A. B is not bound to prove that there are men on Mars—in fact it is the very thing that he denies, and in the present state of astronomical knowledge, no one can say whether it is true or not. Suppose, however, that A's statement were false and defamatory of C, then if B repeats it with some comment of his own, and C sues B for defamation, B cannot successfully plead fair comment unless his comment is a repudiation of the lie; for any other kind of comment of his would be an acceptance of a lie put in circulation by A; *i.e.*, comment based upon what is untrue.

In this connexion the so-called "rolled-up" plea has caused much perplexity. By it the defendant alleges that "in so far as the words complained of consist of allegations of fact, they are true in substance and in fact, and in so far as they consist of expressions of opinion they are fair comments made in good faith and without malice upon the said facts, which are matters of public interest". The original object of this plea (which was sanctioned in 1890 (*c*)) was to make it clear that the defendant proposed to prove the truth of the facts on which he had commented. As has just been said, no

The "rolled-up" plea

(a) See *dictum* of Kennedy, J., in *Joynt v. Cycle Trade Publishing Co.*, [1904] 2 K. B. 292, 294; approved in *Hunt v. Star Newspaper Co., Ltd.*, [1908] 2 K. B. 309, 317, 320. *Lyon v. Daily Telegraph, Ltd.*, [1943] K. B. 746.

(b) Phillimore, J., in *Mangena v. Wright*, [1909] 2 K. B. 958, 976—977.

(c) *Penrhyn v. Licensed Victuallers' Mirror*, 7 T. L. R. 1.

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comment can be fair unless it is comment upon facts. The plea was therefore one of fair comment and not of justification, and the sole reason for its use was that it was difficult to frame the plea in any other way if facts and comment were so mixed up in the defendant's imputation as to be inextricable. But then it often occurred that the defamatory statement did not happen to include all the facts upon which the defendant had made his comment; of course it would be much tidier from the lawyer's point of view if critics always took care to include all the facts, but when a man is uttering or writing criticism he generally knows little about the law of defamation and even less about the niceties of pleading in it. At any rate if he had not included all the facts, and were sued for defamation, he would be compelled to go outside his defamatory statement to collect the rest of the facts upon which his comment was based. Therefore the concluding words of the above plea, "they are fair comments made . . . upon the said facts which are matters of public interest" could not, with respect to the italicised words, be accurate. So the practice sprang up of omitting them and the plea simply wound up, "they are fair comments made in good faith and without malice on a matter of public interest" (d). This was most unfortunate, for it gave rise to the idea that the plea was one of (i) justification and (ii) fair comment, "rolled-up" together; and it took a decision of the House of Lords in *Sutherland v. Stopes* (e) to remind the profession that it was still a plea of fair comment and of nothing else. The result now is that the plea ought not to be used at all in the mutilated form described above. A better plan, if all the facts are not included in the defamatory statement, is not to make use of the rolled-up plea, but to plead fair comment and then to set out particulars of the facts upon which the defendant commented (f). The rolled-up plea can still be used in its original un mutilated form where all the facts are embodied in the defamatory statement but are inextricable from the comment; and if it is used the defendant cannot be compelled to say what parts of the statement are allegations of fact and what parts are comment, for that is what the jury have to decide and he is not forced to predict what their findings will be (g).

(d) Odgers, *op. cit.*, 514—516.(f) Odgers, *op. cit.*, 515—516.(g) *Aga Khan v. Times Publishing Co.*, [1924] 1 K. B. 675; indeed.

(e) [1925] A. C. 47.

(iii) *The comment must be fair.*—First, as to the functions of Judge and jury. If the Judge considers the comment to be an expression of honest opinion and within the limits of criticism, he must not let the case go to the jury (h). But if he has any doubt as to this, then the jury must settle the question.

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(iii) Must
be fair

It is not easy to state with precision the principles upon which they must settle it. "One thing, however, is perfectly clear", said Collins, M.R., in *McQuire v. Western Morning News Co., Ltd.* (i), "and that is that the jury have no right to substitute their own opinion of the literary merits of the work for that of the critic, or to try the 'fairness' of the criticism by any such standard. 'Fair', therefore, in this collocation certainly does not mean that which the ordinary reasonable man, 'the man on the Clapham omnibus' as Lord Bowen phrased it, the jury, common or special, would think a correct appreciation of the work; and it is of the highest importance to the community that the critic should be saved from any such possibility". The learned Master of the Rolls went on to select as a broad test of unfairness "something that passes out of the domain of criticism itself. Criticism cannot be used as a cloak for mere invective, nor for personal imputations not arising out of the subject-matter or not based on fact" (k).

Mere violence in criticism does not make it unfair. Moderation here "is only used to express the idea that invective is not criticism. It certainly cannot mean moderate in the sense that that which is deemed by a jury, in the case of a literary criticism, extravagant and the outcome of prejudice on the part of an honest writer is necessarily beyond the limit of the fair comment". So Collins, M.R., again in

however the defence is pleaded, the jury must always decide this unless the statement is so clearly one of fact that no reasonable man would regard it as an expression of opinion; in that event, the Judge should tell the jury so: *ibid.*, 679—680, where the reasons are set out by Bankes, L.J. See, too, *Tudor-Hart v. British Union, etc.*, [1938] 2 K B 329

(h) *McQuire v. Western Morning News Co., Ltd.*, [1903] 2 K. B. 100 (W Cases 120)

(i) [1903] 2 K B 100

(k) The rule that juries must not substitute their own views for those of the critic is a salutary one, but probably the more competent a jury is to judge the matter criticised the harder it will be to observe the rule. A special jury of law teachers, in considering the fairness of criticisms on this book, would have to make a considerable effort to restrain themselves from assessing it by their own opinions of the book.

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McQuire's Case (l), where a critique of a play imputed that it was dull, vulgar and degrading, and the Court of Appeal, in giving judgment for the defendants, held that the case ought not even to have been left to the jury (m).

Whether comment can be fair if bad motives are imputed to the plaintiff depends upon circumstances, and certainly the law is now more lenient to critics on this point than it was a century ago (n). Where a man's conduct may be rightly open to ridicule and disapprobation, it would nevertheless be wrong to charge him with base, sordid or wicked motives unless there were so much ground for the charge as to make it clear not only that the defendant honestly believed it to be true but also that he had foundation for his belief. "Where the public conduct of a public man is open to animadversion, and the writer who is commenting upon it makes imputations on his motives, which arise fairly and legitimately out of his conduct, so that a jury shall say that the criticism was not only honest but also well founded, an action is not maintainable". This was the rule laid down by Cockburn, L.C.J., in the oft-cited case of *Campbell v. Spottiswoode* (o). Dr. Campbell, a dissenting minister, published in his newspaper (the *British Ensign*) a scheme for inserting in it a series of letters on converting the Chinese and for promoting the circulation of copies of the paper in which these letters appeared in order to call attention to the importance of this evangelising work. The defendant imputed in another newspaper that Dr. Campbell's alleged aim of propagating the gospel in China was "a mere pretext for puffing an obscure newspaper" (the *Ensign*). It was held that, though the defendant believed this to be true, he had no defence; for what he believed had no foundation at all.

For the rest, a sound canon of criticism in both law and literature is that it should attack a man's work and not the man himself. "Shew me an attack", said Lord Ellenborough,

(l) [1903] 2 K. B. at p. 110. Cf. a reviewer's opinion that Keats' *Endymion* was a poem of "calm, settled, imperturbable idiocy". This is violent enough, but is not on that account unfair.

(m) A test given by Lord Esher, M.R., in *Mervale v. Carson* (1887), 20 Q. B. D. 275, 281, was, "Would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism said of the work which is criticised?" But this is such a queer idea of a "fair man" that it is more likely to confuse juries than to help them.

(n) Odgers, *op. cit.*, 182—184.

(o) (1863), 3 B. & S. 769, 777.

C.J. (p), "on the moral character of this plaintiff, or any attack upon his character unconnected with his authorship, and I should be as ready as any Judge who ever sate here to protect him."

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(iv) *The comment must not be malicious.*—Malice here means evil motive. Until 1906 there was considerable doubt whether private spite on the critic's part could make his comment unfair. In theory it is possible to judge a man's work fairly even if you hate him, though it is not easy in practice. However, in that year the Court of Appeal held, in the only successful libel action ever brought against the proprietors of *Punch*, that malice may negative fairness; *Thomas v. Bradbury, Agnew & Co., Ltd.* (q). In that case, the book reviewer of *Punch* showed both by his review of the plaintiff's book and by his demeanour in the witness-box and elsewhere personal hostility to the plaintiff, and judgment for £300 damages was affirmed.

(iv) Must not be malicious.

In *Lyon v. Daily Telegraph, Ltd.* (r), the defendants published in their newspaper a letter criticising a public entertainment given by the plaintiffs. The letter was signed "A. Winslow" and gave as an address "The Vicarage, Wallington Road, Winchester". In fact there was no such place in Winchester, nor was any "Winslow" traceable in a clerical directory. But the comment itself was fair and the Court of Appeal held that the fictitious name and address did not constitute malice so as to make it unfair. A newspaper is under no duty to verify the name and address of a correspondent, or to prove that the writer honestly held the opinion expressed in the comment; if the rule were otherwise, it would lay far too heavy a burden on the press in relation to free discussion of matters of public interest (s).

It is disputed whether fair comment is properly regarded (i) as a right which every one has, or (ii) as a species of qualified privilege (t). Judicial dicta are in conflict upon the

Fair comment and privilege.

(p) *Carr v. Hood* (1808), 1 Camp. 355, 358. Carlyle's opinion of Charles Lamb that he was a "pitiful, rickety, gasping, staggering, stammering, tom-fool" seems to have erred on the side of a personal attack.

(q) [1906] 2 K. B. 627.

(r) [1943] K. B. 746.

(s) If it had been proved that the writer did not honestly hold the opinion which he expressed, that would have negatived fairness of the comment in an action against him; but would it have deprived the newspaper of the defence of fair comment? This point was left open by the C. A.

(t) Explained post, § 85.

§§ 84, 86.

question. Collins, M.R., in *Thomas's Case* (*supra*) regarded fair comment and qualified privilege as "governed by precisely the same rules" (a), but this was inconsistent with an earlier opinion of Lord Esher, M.R., in *Merivale v. Carson* (a) and with other *dicta*. The monographs on defamation and the text-books on tort are, on balance, against the view of Collins, M.R. (b). I venture to think that they are correct and that fair comment and qualified privilege are separate in their nature, but that it is only the House of Lords who can now settle the conflict. The chief objections to the second view seem to me to be two. First, so far as the contents of the statement go, mere honest belief in them on the part of the defendant is enough to preserve qualified privilege if the case is one that falls under qualified privilege at all; but the fact that a comment is based upon honest belief does not necessarily make it fair (c). Secondly, malice, and nothing but malice, will rebut qualified privilege, whereas comment may be unfair in other ways than by being malicious: *e.g.*, if it is upon matter which the law regards as not open to comment at all.

Privilege.

§ 85. Privilege.

The law recognises that there are some occasions on which there ought to be no liability for defamation because the interests of the public, or (exceptionally) those of the individual who originates the defamation, outweigh the plaintiff's right to his reputation. Such occasions are said to be "privileged". The term is an unhappy one and was severely criticised by Mr. Spencer Bower who, after considering six possible alternatives to it, rejected them all in favour of "immunity" (d). But the legal profession has evinced no desire to accept this, or any other, substitute for "privilege", and so it is retained here. Whether it exists or not in any given case is a question of law for the Judge.

Privilege may be either (1) absolute, or (2) qualified. It is absolute where the communication of the matter is of such

(a) [1906] 2 K. B. at p. 641.

(a) (1887), 20 Q. B. D. 275, 280.

(b) Fraser, *op. cit.*, 105; Odgers, *op. cit.*, 158; Gatley, *op. cit.*, 369—371; Pollock, Torts, 202—203; Salmond, Torts, § 115 (15); Clerk & Lindsell, Torts, 751—753. *Contra*, Bower, *op. cit.*, 322, and F. R. Y. Radcliffe in 23 L. Q. R. (1907), 97—99.

(c) Blackburn, J., in *Campbell v. Spottiswoode* (1863), 3 B. & S. 769, 781.

(d) *Op. cit.*, Appendix VIII.

paramount importance to the public that nothing can defeat it. Here the plaintiff has no action for defamation, however outrageous a lie the defendant may have propagated about him and however malicious may have been his motive. It is a striking instance of the subordination of the individual's interest to that of the community, for the law frankly recognises the possibility of injury being done to him by the reckless, or even deliberate, falsity of the statement, but decides that the risk of this must be taken. Privilege is qualified where the defendant is entitled to make the statement even if it is false, but only if he makes it honestly with respect to what he states and the means by which he states it. If the plaintiff can prove that he did not observe these limitations, the privilege is said to be rebutted by "malice", a word which here, as elsewhere, inadequately expresses what is meant.

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§ 86. Absolute privilege.

Absolute privilege.

This includes:—

(i) *Statements made in Parliament.*—The Bill of Rights, 1689, settled this (e).

(i) Statements in Parliament.

(ii) *Reports, papers, votes and proceedings ordered to be published by either House of Parliament.*—The Parliamentary Papers Act, 1840 (f), by establishing this, put an end to a bitter and unedifying dispute between the House of Commons and the Law Courts.

(ii) Parliamentary papers.

(iii) *Judicial proceedings.*—Whatever is stated in a judicial proceeding is absolutely privileged, provided it has some reference to the inquiry in hand. It does not matter who states it—the Judge, the jury, the parties, the advocate, the witness. It does not matter how false or malicious it may be. It does not matter whether the statement is in oral or documentary form. The reason why Judges are protected has been explained in an earlier section (g). The privilege is a very wide one, but public and professional opinion would prevent the Judges from abusing it and they have "the power and ought to have the will to check any abuse of it by those who appear before them" (h).

(iii) Judicial proceedings.

(e) 1 W. & M., sess. 2, c. 2. The Bill was declared to be law by 2 W. & M. c. 1 (1690).

(f) 3 & 4 Vict. c. 9.

(g) *Ante*, p. 91.

(h) Lopes, L.J., in *Royal Aquarium Society, Ltd. v. Parkinson*, [1892] 1 Q. B. 431, 451.

§ 86.

The reason for the advocate's immunity is best described by Brett, M.R., in *Munster v. Lamb* (i): "A counsel's position is one of the utmost difficulty. He is not to speak of that which he knows; he is not called upon to consider whether the facts with which he is dealing are true or false. . . . If amidst the difficulties of his position he were to be called upon during the heat of his argument to consider whether what he says is true or false, whether what he says is relevant or irrelevant, he would have his mind so embarrassed that he could not do the duty which he is called upon to perform. For, more than a Judge, infinitely more than a witness, he wants protection on the ground of benefit to the public". This no doubt covers the ground for his exemption from an action for defamation, but it overstates his protection against disciplinary action by his Inn of Court if he outrages the traditions of his profession (k). Moreover, he incurs the penalties for contempt of Court by insolence to the Judge or by violent and abusive language to the jury (l).

The witness's protection is so obviously based on the necessity of giving fearless revelation of what he knows that it calls for no elaboration of the cases in which it has been established (m).

Judicial privilege, in the wide sense explained above, applies not only to any ordinary law Court but also whenever there is an authorised inquiry which, though not before a Court of Justice, is before a tribunal which has similar attributes (n), e.g., a military Court of Inquiry, or a Select Committee of Inquiry of the House of Commons. We have already dealt with this more fully under "Judicial Acts" (o).

The statement is not privileged if it has no reference to the

(i) (1883), 11 Q. B. D. 588.

(k) E.g., Dr. Kenealy was disbarred by his Inn of Court in consequence of his behaviour in the defence of the Tichborne Claimant; J. B. Atlay, *The Tichborne Case*, 202—206, 229.

(l) *Ex parte Pater* (1864), 9 Cox C. C. 544; Oswald, *Contempt of Court* (3rd ed. 1910), 50—52.

(m) *Seaman v. Netherclift* (1876), 2 C. P. D. 53. For a full historical review of the authorities, see Pigot, C.B., in *Kennedy v. Hilliard* (1859), 10 Irish Common Law Reports, 195.

(n) Lord Esher, M.R., in *Royal Aquarium Society, Ltd. v. Parkinson*, [1892] 1 Q. B. 431, 442. Approved in *O'Connor v. Waldron*, [1935] A. C. 76, 81. See, too, *Smith v. National Meter Co., Ltd.*, [1945] 2 A. E. R. 35.

(o) *Ante*, § 22 (2) (ii). Winfield, *Abuse of Legal Procedure* (1921), Ch. VII.

inquiry which is proceeding. This is generously interpreted and the privilege of a witness is not limited to statements for which, if untrue, he might be indicted for perjury (*p*). But it would not extend to an entirely irrelevant answer unprovoked by any question put to him: *e.g.*, if to counsel's question, "Were you at York on June 1?" he replies, "Yes, and X picked my pocket there" (*q*).

So, too, if a Judge makes a defamatory statement in a matter over which he has no jurisdiction, he cannot plead privilege (*r*). Attempts have been made to draw a distinction between Judges of superior Courts and Judges of inferior Courts, and it has been said that in no circumstances whatever is an action maintainable against the former; but this does not appear to be warranted by authority (*s*). At any rate, whether the Court be superior or inferior, the Judge is not liable unless he knew, or had the means of knowing, of the defect which deprived him of jurisdiction. The Privy Council held this to be so with respect to an inferior Indian Court in *Calder v. Halket* (*t*), and a *dictum* of Willes, J., in *Mayor of London v. Cox* (*u*) carries the same point for English jurisdictions. The protection of a superior Court cannot be less.

Communications between solicitor and client.—Any professional communication between solicitor and client is privileged, but it is uncertain whether the privilege is absolute or qualified (*a*). The Court of Appeal in *More v. Weaver* (*b*) held that it was absolute, but the House of Lords in *Minter v. Priest* (*c*) found it unnecessary to decide the question and preferred to leave it open. On principle, no

Solicitor
and client

(*p*) Bramwell, J.A., in *Seaman v. Netherclift* (1876), 2 C. P. D. 53, 60.

(*q*) Cockburn, C.J., *ibid.*, 56—57.

(*r*) *Case of the Marshalsea* (1612), 10 Rep. 68 b, 76 a.

(*s*) Odgers, *op. cit.*, 192, cites *Floyd v. Barker* (1607), 12 Rep. 23, 24; but the *dictum* does not go so far. Gatlley, *op. cit.*, 193, admits that the point is perhaps open, for while he cites De Grey, C.J., in *Miller v. Seare* (1777), 2 W. Bl. 141, 145, as favouring immunity, he concedes that Lord Esher, M.R., in *Anderson v. Gorrie*, [1895] 1 Q. B. 668, 671, assumed that the defendants, Judges of the Supreme Court of Trinidad, would have been liable if they had exceeded their jurisdiction. I venture to think that the assumption was vital to the decision.

(*t*) (1839), 3 Moore, P. C. 28.

(*u*) (1867), L. R. 2 H. L. 239, 263.

(*a*) Distinguish this privilege in the law of defamation from the privilege in the law of evidence which enables a client to prevent his legal adviser from disclosing any professional communication. The point is clearly taken by Lord Atkin in *Minter v. Priest*, [1930] A. C. 558, 578 *seq.*

(*b*) [1928] 2 K. B. 520.

(*c*) [1930] A. C. 558.

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strong reason seems to have been advanced for regarding the privilege as absolute. It ought to be only in the most exceptional cases that, in the interests of the public, privilege should be ranked as absolute, and surely a solicitor and his client are sufficiently protected if they are conceded qualified privilege for their transactions with each other. It ought to be unnecessary to go beyond that and give them immunity if either of them in the course of consultation makes a false statement about a third person which is "malicious" in that it is either spiteful or reckless in itself or is uttered or written without precautions against its being overheard or read by strangers.

The privilege has been regarded as *ejusdem generis* with "judicial privilege" (d), but the affiliation is a loose one, for it is not confined to the walls of a law Court and indeed extends to communications which have nothing to do with litigation, e.g., the drawing of a client's will.

One restriction on it is that the communication must be a professional one. First, the relationship of solicitor and client must be proved, and it is regarded as sufficiently established for this purpose if, though the solicitor does not ultimately accept a retainer, the statement were made in communications passing between him and a prospective client with a view to retainer (e). Secondly, what passes between them when the relationship has been established is privileged if, within a very wide and generous ambit of interpretation, it is fairly referable to the relationship (f), or (to put it in another way) if it consists of "professional communications passing for the purpose of getting or giving professional advice" (g). This would exclude a piece of gossip interjected by the client in a conversation on, say, land registration: e.g., "Have you heard that Jones has run off with Mrs. Brown?" (h). Another illustration is *Minter v. Priest* (i) where the House of Lords held that conversations relating to the business of obtaining a loan for the deposit sum to be paid on the purchase of land fall under the professional work of a solicitor, but that conversations about speculation in land to enable the solicitor

(d) Scrutton, L.J., in *More v. Weaver*, [1928] 2 K. B., at pp. 521—523.

(e) *Minter v. Priest*, [1930] A. C. 558.

(f) Lord Buckmaster and Lord Thankerton, *ibid.*, at pp. 568, 586.

(g) Lord Atkin, *ibid.*, 581.

(h) Scrutton, L.J., in *More v. Weaver*, [1928] 2 K. B., at p. 525.

(i) [1930] A. C. 558.

to share in the profits do not and that slanders of third persons uttered by the solicitor in the course thereof are not privileged.

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(iv) *Communications made by one officer of State to another in the course of his official duty (j)*.—In *Chatterton v. Secretary of State for India (k)*, the plaintiff was an officer in the Indian Staff Corps. The defendant, in the course of his duty, wrote to the Under-Secretary of State that the Commander-in-Chief in India and the Government of India recommended the removal of the plaintiff to the half-pay list as an officer, and the letter stated the reasons for the recommendation. The Court of Appeal held that an order dismissing the plaintiff's action for libel as vexatious had been rightly made, on the ground that it would be injurious to the public interest to allow such an inquiry, for it would tend to deprive officers of State of their freedom of action in matters concerning the public weal. If an action for defamation were permitted, it would place their official conduct at the mercy of a jury who might to that extent substitute themselves for the officials in governing the country. The more recent decision in *Isaacs & Sons, Ltd. v. Cook (l)*, shows that the fact that a report relates to commercial matters does not in itself preclude it from being one relating to State matters.

Official
communica-
tions.

In *Szalatnay-Stacho v. Fink (m)*, the Court of Appeal, while expressing doubt as to the general application of absolute privilege to foreign officials, held that it might apply where the government of an allied State (Czecho-Slovakia) was stationed in England during the World War; but that this did not compel or authorise the Court to accept a rule of the Czecho-Slovak law which conferred on officials a much wider exemption from liability than that afforded by English law (n).

Military
reports.

The law with respect to reports made in pursuance of military or naval duty is in a doubtful position. One would

(j) According to Henn-Collins, J., in *Szalatnay-Stacho v. Fink*, [1946] 1 A. E. R. 303, absolute privilege of this kind does not extend to officials below the rank of Ministers, although it is quite possible for them to have qualified privilege; but the Court of Appeal made no reference to this limitation of absolute privilege; [1947] 1 K. B. 1.

(k) [1895] 2 Q. B. 189.

(l) [1925] 2 K. B. 391.

(m) [1947] 1 K. B. 1.

(n) It was held, however, that, in the circumstances, qualified privilege could be successfully pleaded; for that could be established without taking any account of the wide exemption claimed in the plea of absolute privilege.

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have thought that such reports relate to matters of "State" just as much as reports by a Secretary of State for India and that there ought to be no more doubt in the one case than in the other; no one has defined "State official" in this connexion, but the layman's tendency to limit the term to civil servants of the State does not appear to be reproduced in judicial decisions. Indeed, it is difficult to find in the law reports any difference between the reasons urged for immunity of the soldier and those put forward for the immunity of the civil servant. Nevertheless, it is still uncertain whether naval and military reports have absolute immunity or only qualified privilege. We are not speaking here of what goes on in courts-martial (that falls under "Judicial privilege", *ante*, § 86 (iii)), but of adverse opinions expressed by one officer of the conduct of another. In *Dawkins v. Lord Paulet* (o), a majority of the Court of Queen's Bench held that no action would lie against a military officer for such a report made by him in the ordinary course of his duty even if it were made maliciously and without reasonable and probable cause. The decision was weakened by the strong dissenting judgment of Cockburn, C.J., and in the later case of *Dawkins v. Lord Rokeby* (p), the Exchequer Chamber congratulated themselves on the fact that the question was still open for consideration by the House of Lords. Perhaps the present position was best stated by Dr. Blake Odgers, who thought it unlikely that in a Court of first instance any cognisance would be taken of purely military or naval matters which do not affect the *civil* rights of the person complaining (q). The arguments that might be presented to a higher Court cannot be fully considered here, but upon the whole it seems that the majority decision in *Dawkins v. Lord Paulet* was correct. The judgment of Mellor, J., in adopting the principle of absolute privilege, dealt with the argument that qualified privilege would suffice in such cases and that if an officer made malicious statements he ought to be liable; to this the learned Judge replied that, if this were the rule, cases might often occur in which the Judge would have to leave to a jury most difficult

(o) (1869), L. R. 5 Q. B. 94.

(p) (1873), L. R. 8 Q. B. 255, 272; on appeal, the decision of the House of Lords was based on the ground that the defendant was a witness before a tribunal, which must be regarded as a judicial body; (1875), L. R. 7 H. L. 744.

(q) *Op. cit.*, 204.

questions of military discipline which they would not be qualified to decide. "The promotion of an incompetent man may cause the greatest disaster, and yet, if the person who has to make his report as to the fitness or unfitness of such officer is to do it under the idea that the opinion he expresses may be overruled by a jury ignorant of such matters, how can he be expected to do it freely?" (r). Here, as in some other instances in our law, it seems that a man will best perform his duties by being released from the fear of being sued rather than by being given an easily substantiated defence if he is sued.

(v) *Fair and accurate newspaper reports of judicial proceedings.*—But it is doubtful whether the privilege is absolute or only qualified. The difficulty arises from the interpretation of section 3 of the Law of Libel Amendment Act, 1888 (s), which provides that a fair and accurate report in any newspaper of proceedings publicly heard before any Court exercising judicial authority shall, if published contemporaneously with such proceedings, be privileged; but that this shall not authorise the publication of any blasphemous or indecent matter (t).

(v) Reports of judicial proceedings

As we shall see, such reports, whether made in a newspaper or any other document, have qualified privilege at Common Law, but what exactly the Act has done on this point is a puzzle (u). Some authorities think that section 3 created absolute privilege, others that it only gave a slovenly affirmance to the Common Law qualified privilege (v). Its original purpose was to put newspaper reports in a better position than reports made by private persons, but it received such rough handling in Committee that no one can be precisely sure of what it does enact. At least it is safe to say that it put the report of a judicial proceeding in no worse a position than that which it occupied at Common Law (w).

(r) L R 5 Q B, at p 115

(s) 51 & 52 Vict c 64

(t) The report is still privileged even if it includes defamatory interruptions by A in proceedings between B and C, provided that they are connected in some way with the proceedings. *Farmer v Hyde*, [1937] 1 K B 728

(u) *Post*, § 87 (ii)

(v) *Fraser*, *op cit* 133 *Odgies op cit* 267—268 *Gatley, op cit*, 351—353, *Pollock Torts* 217, and *Mr Landon's comment in note (m)*, *Salmond, Torts*, § 107 (5)

(w) *Odgies, op cit*, 267—268

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Qualified
privilege.(i) Reports
of Parlia-
mentary
proceedings.(ii) Reports
of judicial
proceedings.

§ 87. Qualified privilege.

This includes—

(i) *Fair and accurate reports of Parliamentary proceedings.*—

The long battle between reporters and Parliament on this matter belongs to Constitutional Law rather than to the Law of Tort (a). However, in 1868, *Wason v. Walter* (b) settled the privilege of faithful reports. The decision was a strong piece of judicial legislation, for two earlier, but abortive, attempts had been made to get Parliament to sanction this privilege. It would have been hard indeed if the plaintiff had succeeded in his action, for he had procured a peer to present to the House of Lords a scandalously false attack on Sir Fitzroy Kelly, then newly appointed Chief Baron of the Court of Exchequer, and the Lord Chancellor had described the petition as a perpetual record of the plaintiff's falsehood and malignity. The *Times* newspaper accurately reported this proceeding and thereupon the plaintiff sued the publishers for libel. The action was dismissed. The Court regarded the privilege as on the same footing as reports of judicial proceedings: i.e., the advantage of publicity outweighed any private injury resulting from publication.

(ii) *Fair and accurate (c) reports of judicial proceedings which the public may attend (d).*—This applies to the proceedings of any Court of justice, high or low. "For this purpose", said Lord Campbell, C.J. (e), "no distinction can be made between a Court of pie poudre and the House of Lords sitting as a Court of Justice". Nor, according to the better opinion, does it matter whether the Court had jurisdiction or not, for it would be harsh to expect the reporter to be an infallible judge of a matter upon which the Court itself is often in doubt (f). Again, it is immaterial whether the proceedings are *ex parte* or interlocutory or are adjourned from time to time. "The privilege applies to a fair and correct account of proceedings published before the final decision is arrived at, if in the end there must be a final decision. . . . If it were not so, the ridiculous result would follow that, where the

(a) Anson, *Law of the Constitution*, vol. i (5th ed. 1922), 172—177.

(b) L. R. 4 Q. B. 73.

(c) Cf. *Mitchell v. Hirst, etc., Ltd.*, [1936] 3 A. E. R. 872.(d) *Usill v. Hales* (1878), 3 C. P. D. 319.(e) *Lewis v. Levy* (1858), E. B. & E. 537, 554.(f) The dictum of Lopes, J., in *Usill v. Hales* (1878), 3 C. P. D. 319, 329, is preferable to that of Lord Coleridge, C.J., at p. 324. See Odgers, *op. cit.*, 254—255; Gatlley, *op. cit.*, 331—332.

trial of a case of the greatest public interest lasted fifty days, no report could be published until the case was ended" (g). Reporters, therefore, need not wait until the final decision is rendered, but they must recollect that any comment, as distinct from fair and accurate reproduction, must be postponed until the decision is given; otherwise they make themselves liable to the penalties for contempt of Court or to an injunction (h), for intermediate comment is likely to prejudice the minds of a jury in a jury action and might conceivably influence the Judge.

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The following points with respect to this species of privilege are noteworthy. First, if the proceedings are not public, it does not apply. Hence, reports of the decisions of a domestic tribunal like the stewards of the Jockey Club, have not this immunity (assent of the party defamed to the publication is, however, a defence: *ante*, p. 271). For the ground of the privilege is that, if the public are entitled to be present in a Court, they are also entitled to be informed of what goes on in their absence; and they have no right to be present at the proceedings of a domestic tribunal (i). Secondly, the privilege presumably does not apply if the Court has forbidden publication, for the report would then be a contempt of Court (k). Thirdly, even at Common Law it is a criminal offence to publish obscene matter, so qualified privilege will not cover a report of that (l), and this Common Law restriction was drawn tighter by the Judicial Proceedings (Regulation of Reports) Act, 1926 (m). Parliament felt that the time had come to call a halt to the practice of some newspapers of reporting the more salacious details of a certain type of legal proceedings, for the mere purpose of inflating their circulation. The Act makes it a criminal offence for any one to print or publish, whether in a newspaper or in any other document, (i) in relation to judicial proceedings any indecent matter

Qualifications.

(g) Lord Esher, M.R., in *Kimber v. Press Association, Ltd.*, [1893] 1 Q. B. 65, 71.

(h) *Brook v. Evans* (1860), 29 L. J. Ch. 616.

(i) *Per Romer L.J.*, in *Chapman v. Ellesmere*, [1932] 2 K. B. 431, 475. The remarks of Greer, L.J., in *Cookson v. Harewood*, *ibid.*, 485, are not really in conflict with this.

(k) *Brook v. Evans* (1860), 29 L. J. Ch. 616.

(l) *Re The Evening News* (1887), 3 T. L. R. 255.

(m) 16 & 17 Geo. 5, c. 61. The Summary Procedure (Domestic Proceedings) Act, 1937 (1 Edw. 8 & 1 Geo. 6, c. 58), s. 3, has much the same provisions with respect to reports of proceedings before a Court of summary jurisdiction.

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calculated to injure public morals, or (ii) in relation to judicial proceedings for dissolution or nullity of marriage, or for judicial separation or for restitution of conjugal rights, anything except (in effect) innocuous details of the case. Presumably the Act deprives any report infringing its provisions of privilege in an action for defamation, provided the report contains defamatory matter. There are exemptions from the Act, such as *bona fide* law reports published in a separate volume or parts, and publications of a technical character *bona fide* intended for circulation in the legal and medical professions.

(iii) Reports
of public
meetings.

(iii) *Fair and accurate newspaper reports of the proceedings of any public meeting.*—This qualified privilege was created by the Law of Libel Amendment Act, 1888 (*n*). It defines a “public meeting” as one which is *bona fide* and lawfully held for a lawful purpose and for the furtherance or discussion of any matter of public concern, whether the admission thereto be general or restricted. The Act also requires the subject-matter of the report to be of public concern and the publication of it to be for the public benefit.

The Common Law put the editor of a newspaper in a difficult position. The interests of his newspaper, and indeed of the public, demand that publication of such news should be prompt. The law demanded that it should not be defamatory. What could an editor do to satisfy both these demands? If, in the hurry of setting up a daily journal, he was bound to verify the accuracy of every statement made at a meeting, he had an impossible task put upon him. In practice he took the risk until *Purcell v. Sowler* in 1877 (*o*) reminded him of the law in a fashion which caused consternation throughout the newspaper world. The publishers of a newspaper were held liable for accurately repeating a charge (which in fact was false) made at a meeting against a medical officer (who was not present) of neglecting his pauper patients. In consequence of this decision, a hasty and ineffective Act was passed in 1881 to protect newspapers. Litigation soon disclosed its weaknesses (*p*), and then the Act of 1888 put the matter on a more satisfactory basis (*q*). On the one hand, the public

(*n*) 51 & 52 Vict. c. 64, s. 4

(*o*) 2 C. P. D. 215.

(*p*) *Pankhurst v. Sowler* (1886), 3 T. L. R. 193.

(*q*) Odgers, *op. cit.*, App. B., gives the full history of the law.

gain by getting speedy reports of such meetings; on the other hand, the Act is certainly not a charter of immunity for any lying statement which is made at any meeting and which is put into print by a newspaper, for, if the matter reported is not of public concern, or if its publication is not for the public benefit, the privilege disappears. Reports of a torrent of abusive interruptions which have nothing to do with the purpose for which the meeting was summoned are not privileged (r), nor are remarks made at a company shareholders' meeting unless they are confined to the financial affairs of the company (s). Again, every meeting is not a public one. The ordinary Sunday service of a place of worship is not (t). Finally, nothing in the Act authorises the publication of any blasphemous or indecent matter (u).

(iv) *Statements made by A to B about C (a) which A is under a legal, moral or social duty to communicate to B and which B has a corresponding interest in receiving; or (b) where A has an interest to be protected and B is under a corresponding legal, moral or social duty to protect that interest* (a).

(iv) Statements made in pursuance of duty.

"If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society" (b). A very common example is that of a former employer giving the character of a servant to a prospective employer.

It was thought at one time that, so long as the recipient (who must be some person other than the plaintiff (c)) had an interest in hearing the statement, it was immaterial that the communicator had no interest in making it. But in *Watt v. Longsdon* (d), the Court of Appeal dispelled this view and emphatically adopted the rule that reciprocity of interest is essential. B was foreign manager of the X Co. He wrote to the defendant, a director of the company, a letter containing gross charges of immorality, drunkenness and dishonesty on

(r) *Kelly v. O'Malley* (1889), 6 T. L. R. 62.

(s) *Ponsford v. Financial Times, Ltd.* (1900), 16 T. L. R. 248.

(t) *Chaloner v. Lansdown* (1894), 10 T. L. R. 290.

(u) S. 4.

(a) See Lord Greene, M.R., in *De Buse v. McCarthy*, [1942] 1 K. B. 156, 164.

(b) Parke, B., in *Toogood v. Spyring* (1834), 1 C. M. & R. 181, 193; cited by Scrutton, L.J., in *Watt v. Longsdon*, [1930] 1 K. B. 130, 143.

(c) *White v. Stone, Ltd.*, [1939] 2 K. B. 827.

(d) [1930] 1 K. B. 130 (W. Cases, 123).

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the part of the plaintiff, who was managing director of the company abroad. The defendant wrote a reply to B in which he stated his own suspicions of the plaintiff's immorality and asked B to get confirmation of B's own allegations in order that the defendant might communicate them to the plaintiff's wife whom the defendant stated to be an old friend of his. Then, without waiting for any corroboration of B's statement, the defendant showed B's letter to S, the chairman of the board of directors and largest shareholder in the company, and also to the plaintiff's wife. All the allegations against the plaintiff were false. He sued the defendant for libel (i) in writing what he did to B; (ii) in communicating B's letter to S; (iii) in communicating B's letter to the plaintiff's wife. The defendant pleaded qualified privilege. The Court of Appeal had little difficulty in holding that (i) the defendant's letter to B was privileged, because both B and the defendant had a common interest in the affairs of the company, and that entitled them to discuss the behaviour of the plaintiff as another employee of the company and to collect further information for the chairman of the company; (ii) defendant's communication of B's letter to S was privileged, because there was a duty to make it arising both from the fact of employment in the same company and from the possibility that S might be asked by the plaintiff for a testimonial if the plaintiff were seeking another situation. But the Court held that (iii) the communication of the letter to the plaintiff's wife was not privileged. No doubt she had the strongest possible interest in hearing a statement about her husband's moral conduct; no doubt also there may be occasions on which a friend of the wife is under a duty, or has a corresponding interest, in informing her of statements about her husband,—indeed each case must depend on its own circumstances, the nature of the information and the relation of the speaker to the wife (e). But here the defendant had no sufficient interest or duty, for the information came from a very doubtful source and he had neither consulted the plaintiff nor obtained any confirmation of outrageous accusations before passing them to the wife.

In *White v. Stone, Ltd.* (f), the Court of Appeal held that, where A defames B in the presence of C, B also being present,

(e) *Scrutton, L.J.*, [1930] 1 K. B., at pp. 149—150.

(f) [1939] 2 K. B. 827.

and there is no qualified privilege as between A and C, the mere fact that B has an interest in receiving the statement does not create qualified privilege as between A and B. This decision, it is submitted (g), is sounder in principle than the *ratio decidendi* in the earlier cases of *Boaxsius v. Goblet Frères* (h) and *Osborn v. Boulter* (i), where the Court of Appeal held that *qualified privilege existing between A and B* covers incidents of communication in accordance with the reasonable and usual course of business: e.g., dictation by A to his typist, C (k). The earlier decisions might have been based on the simple ground that communication to C was reasonably necessary and incidental to communication to B and therefore was not a "publication" of the defamatory matter (l).

The determination of whether a duty to communicate the matter does or does not exist is a question for the Judge. It is easy enough for him to decide where the duty is a legal one. But where it is alleged to be moral or social, what test is he to adopt? Naturally, no criterion of any affair of ethics or of social relations can be more than an approximate one, but unfortunately the authorities do not show complete agreement on even an approximate test. Lindley, L.J., said in *Stuart v. Bell* (m): "The question of moral or social duty being for the Judge, each Judge must decide it as best he can for himself. I take moral or social duty to mean a duty recognised by English people of ordinary intelligence and moral principle, but at the same time not a duty enforceable by legal proceedings, whether civil or criminal". If "all or, at all events, the great mass of right-minded men in the position of the defendant would have considered it their duty under the

(g) *Pace* Professor Goodhart in 56 L. Q. R. 262—266.

(h) [1894] 1 Q. B. 842.

(i) [1930] 2 K. B. 226.

(k) Is there not a fallacy in the words italicised in the text? Qualified privilege scientifically cannot exist between A, the defamer, and B, the defamed; for qualified privilege is a defence to what is *prima facie* defamation and it is generally agreed that there can be no *prima facie* defamation without publication. Communication to the person defamed is not publication. It is respectfully submitted that in these earlier cases, the Court wrongly assumed that the untechnical "interest", which I have in hearing any statement about myself that you make to me, is the same thing as the technical "interest" which gives rise in the law of defamation to qualified privilege between you and a third party.

(l) Cf. American Restatement of Torts, §§ 577, Comment (h), 604, Comment (c), and Gatlley, *op. cit.*, 94, n. 11.

(m) [1891] 2 Q. B. 341, 350. Cited by Scrutton and Greer, L.JJ., in *Watt v. Longsdon*, [1930] 1 K. B., at pp. 144, 153.

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circumstances " to give the information, then the learned Lord Justice thought that the privilege arose. But Scrutton, L.J., in *Watt v. Longsdon* (n) asked, " Is the Judge merely to give his own view of moral and social duty, though he thinks that a considerable portion of the community hold a different opinion? Or is he to endeavour to ascertain what view the great mass of right-minded men would take? " It is suggested that the answer to this is that the Judge's view if, as is probable, it takes account of the arguments of counsel on each side, as well as of his own personal predilections, is the nearest approach that is possible to the ascertainment of public opinion. You cannot *subpœna* as witnesses any portion of the community in order to discover what they regard as a moral duty. At any rate, it is a fallacy to suppose that the mere existence of any relationship (*e.g.*, host and guest) will suffice to raise the duty without weighing all the circumstances of the particular case before the Court; and this seems to be the explanation of some decisions in which it looks as if facts which really constituted malice (*i.e.*, abuse of the privilege) were regarded as showing that the privilege had never existed at all.

In this privilege a distinction has been drawn between a statement which is made in answer to an inquiry and one which is merely volunteered. Certainly, where there has been a request for the information, that is useful evidence towards showing that the privilege exists, particularly if the case is on the border-line (o), but it does not follow that because the information is given unasked there can be no privilege. A man is but a poor citizen, to say nothing worse of him, if he is deliberately silent when he sees the lives of the public likely to be imperilled or the property of another person in obvious danger of being stolen or destroyed by one whom he honestly believes to be a drunkard or a thief (p). And decided cases show that something less than such urgency as this may be enough to establish privilege for a volunteered statement (q).

Two decisions on reports as to the financial stability of tradesmen must be distinguished. Trade protection societies are often formed for the purpose of supplying such information

Trade
protection
societies.

(n) [1930] 1 K. B., at p. 144.

(o) *Macintosh v. Dun*, [1908] A. C. 390, 399.

(p) *Cozhead v. Richards* (1846), 2 C. B. 569, 609—610.

(q) Collected in *Odgers. op. cit.*, 222—225.

to inquirers, and the law has to steer some middle course between allowing third persons to help a tradesman to protect himself against dealing with insolvent persons and "safeguarding commercial credit against the most dangerous and insidious of all enemies—the dissemination of prejudicial rumour, the author of which cannot be easily identified, nor its medium readily disclosed" (r). In *Macintosh v. Dun* (s), the defendants carried on business as a trade protection society under the title "The Mercantile Agency". X, one of the subscribers to the agency, asked for information about the credit of the plaintiffs who were ironmongers. The agency replied unfavourably and, as it turned out, untruly. In an action for libel, the Judicial Committee of the Privy Council held that there was no privilege, for the defendants were only collectors of information which they were ready to sell to their customers, and it was immaterial whether the customer bought the information across the counter or whether he enjoyed the privilege of being enrolled as a subscriber and paid his fee in advance. In *London Association for Protection of Trade v. Greenlands, Ltd.* (t), the facts were much the same except that the appellants there did not trade for profit and that the secretary to their association collected and supplied the information about Messrs. Greenlands to X. The House of Lords held that the communication was privileged on the ground that the secretary, in supplying it, was acting, not as agent of the association as a whole, but as the confidential agent of X; for if X had the right to make inquiries on his own account, he equally had the right to make them through an agent and the agent was under a duty to report to him. But had the association itself any such privilege? The question could not be directly decided by the House of Lords owing to procedural blunders in the Court of first instance. But Lord Buckmaster, L.C. (u), seemed to be of opinion that the privilege would exist if (i) the association consisted of persons who were themselves interested in trade, and (ii) it exercised control over the person who on their behalf procured the information and over the manner in which he procured it, and (iii) it did not conduct its business purely for purposes

(r) Lord Buckmaster, L.C., in *London Association, etc. v. Greenlands, Ltd.*, [1916] 2 A. C. 15, 26.

(s) [1908] A. C. 390.

(t) [1916] 2 A. C. 15.

(u) At pp. 26—27.

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of gain; but this third requisite has been doubted (a). In *Macintosh v. Dun* not one of these conditions was satisfied; in the *Greenlands Case* all were.

This kind of qualified privilege may quite well exist where the people interested in the receipt of the information are very numerous. Thus it would appear from *Chapman v. Ellesmere* (b) that the stewards of the Jockey Club have qualified privilege for statements published by them relating to the conduct of trainers and other persons connected with the running of horse-races under the rules of the club, for the stewards owe all persons interested in racing conducted under those rules a duty to give them such information (c); but the medium of communication must be a proper one, and it was held in this case that, while publication in the *Racing Calendar* satisfied this condition because both the plaintiff and the defendants had agreed upon this, publication in *The Times* and other newspapers did not, because the racing community could be adequately informed of the decisions of the Jockey Club without broadcasting them to the public in general (d).

(v) Common
interest.

(v) *Where A and B have a common interest in the statement made by A to B about the plaintiff* (e). It is impossible to classify the cases in which such a common interest arises. Whether it exists or not is a question of law for the Judge and probably the principle upon which he ought to resolve it cannot be put more exactly than to say that "the law never sanctions mere vulgar curiosity or officious meddling in the concerns of others" (f). Nor will an honest belief that there is a common interest suffice to create it, if in law there is none (g).

(a) By Lord Parker, at p. 42, and by Scrutton, L.J., in *Watt v. Longsdon*, [1930] 1 K. B. 130, 148. See, too, Salmond, *Torts*, 405, note (f).

(b) [1932] 2 K. B. 431; applied in *Russell v. Duke of Norfolk*, [1948] W. N. 111.

(c) The clearest statement on this point is that of Romer, L.J., at pp. 473-474. Lord Hanworth, M.R., at pp. 449-450, seems to have held the same view. *Contra*, Slesser, L.J., at pp. 465-467.

(d) Note that the parties' assent here was to the *mode* of exercising qualified privilege. Any expressions in the judgments which might indicate that the parties could *create* qualified privilege by agreement cannot be supported for it is the Court alone which settles whether qualified privilege exists or not.

(e) Lord Greene, M.R., in *De Buse v. McCarthy*, [1942] 1 K. B. 156, 64, referred to the fact that this privilege has been stated as requiring a common interest "in the subject-matter" of the communication. He thought these words were too vague to be worth inclusion.

(f) Odgers, *op. cit.*, 232.

(g) *Ley v. Hamilton* (1935), 153 L. T. 384, 385; *Davidson v. Barclays Bank, Ltd.* (1940), 164 L. T. 25.

The common interest may be a pecuniary one, such as a communication made by an insurance company to its policyholders about an agent of the company (*h*); or it may be professional, such as the charge of a bishop to his clergy in convocation (*i*), or the "screening" of a harrister by the Benchers of his Inn of Court after he has been disharred (*k*), or a complaint by the creditor of an officer to his commanding officer, alleging unpunctuality of the officer in paying his debt (*l*). But a general interest in church architecture confers no privilege on the imputations of a clergyman on an architect employed to restore a church of which the clergyman was neither an incumbent, nor a patron, nor a parishioner (*m*). Fair comment may of course be pleadable in such a case provided its requisites are satisfied, and it was on this ground that a newspaper was held to have a defence in publishing adverse criticism of the proceedings of an urban district council, although there was no qualified privilege because there is no common interest between the newspaper proprietors and the public, for the "public" might include a casual stranger who happened to buy a copy of the journal at a railway book-stall in the town and who would obviously have no interest in the matter (*n*).

It would seem, although the English authorities are somewhat discordant, that a clergyman who prays for, or preaches at, another person for some sin which the clergyman expressly or impliedly alleges against him, has no privilege (*o*). No doubt all men are sinners, but an admission of general iniquity is one thing and accusation of personal sin is quite another, and the proper way for a pastor to rebuke it is in private and not in the pulpit, unless indeed public admonition of sin is

(*h*) *Nevill v. Fine Art & General Insurance Co.*, [1897] A. C. 68; *Smythson, Ltd. v. Cramp & Sons, Ltd.*, [1943] 1 A. E. R. 322; the appeal to the H. L., [1944] A. C. 329, was upon a different point.

(*i*) *Laughton v. Bishop of Sodor and Man* (1872), L. R. 4 P. C. 495. It is doubtful how far professional communications about his client made by a solicitor to the opposing solicitor are privileged: *Groom v. Crocker*, [1939] 1 K. B. 194.

(*k*) *Odgers, op. cit.*, 236—237.

(*l*) *Winstanley v. Bampton*, [1943] K. B. 319.

(*m*) *Botterill v. Whytehead* (1879), 41 L. T. 588.

(*n*) *Standen v. South Essex Recorders, Ltd.* (1934), 50 T. L. R. 365.

(*o*) *Greenwood v. Prist (or Prick)* (1584), cited in Cro. Jac. 91, 1 Camp. 270, and 13 St. Tr. 1387 (best report), is the other way, but it was declared not to be law in *Hearne v. Stowell* (1841), 11 A. & E. 726. Both Irish and Scots law support the statement in the text: *Magrath v. Finn* (1877), Ir. R. 11 C. L. 152; *Dudgeon v. Forbes* (1833), 11 S. 1014.

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one of the tenets of the particular form of worship which he professes and the plaintiff has become a member of his congregation on that understanding. If the imputation is true, of course the plea of justification will be available. Whether fair comment can be pleaded presumably depends on the circumstances of the case; if the allegation of sin is based on a matter of fact which is fairly open to public comment (*e.g.*, the behaviour of a public librarian in admitting books of a provocatively erotic character into the library) one does not see why this form of comment on it should be in any worse plight than, say, newspaper criticism; but purely private peccadilloes do not appear to be a fit matter for public comment at all.

(vi) Self-protection.

(vi) *Statements in protection of oneself or of one's property.*—This privilege does not, of course, sanction any wild or reckless words used to meet an attack upon oneself, for the privilege would then be rebutted by malice. If my housemaid tells me that my cook steals my butter and I confront the housemaid with the cook, who retorts that it is the housemaid who steals, she is privileged in saying this, even if it is false, provided that she had some reasonable ground for believing it to be true. That is a legitimate counter-attack, but a mere heated *tu quoque* would not be such.

An example of defence of one's property would be a master's warning to servants not to associate with a former fellow-servant whom he had dismissed for dishonesty (*p*). Another illustration is *Osborn v. Boulter* (*q*), where a publican complained to the brewers who supplied him with beer that it was of poor quality. They retorted that they had heard rumours that the poorness of the beer was due to the watering of it by the publican, and they published this statement to a third party. It was held to be privileged. The case was regarded by the Court of Appeal as illustrative of the type of privilege which is based on the fact that A's statement to B is in protection of an interest of his own and B is under a corresponding duty to protect it (*r*). But it falls just as well under this head, and indeed the reports and text-books draw no very sharp lines of division between these and some other species of qualified privilege.

(*p*) *Somerville v. Hawkins* (1851), 10 C. B. 583.

(*q*) [1930] 2 K. B. 226.

(*r*) *Ante*, § 87 (*iv*).

(vii) *Statements made to the proper authorities in order to procure the redress of public grievances.*—Such would be a petition to the Postmaster-General to correct the alleged delinquencies of a local postmaster (s), or a complaint to the Home Secretary that a local magistrate had incited people to break the peace (t), or to a bishop that a clergyman in his diocese was reputed to have had a fight with the local schoolmaster (u). The grievance need not be one which especially affects the complainant. If it does, he will probably have an additional kind of qualified privilege—statements made in self-protection (a).

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(vii) Redress of public grievances.

The complaint, in order to be privileged, must be addressed to the right person, *i.e.*, to some one who has some power of redressing the grievance. Meticulous selection of the proper official is not necessary. A petition for an inquiry into the conduct of a magistrate and for his removal from office was held to be correctly addressed to the Home Secretary; for, although power of removing a magistrate is with the Lord Chancellor, yet the memorial to the Home Secretary was in effect a petition to the Crown, who might direct the inquiry to be made by the Home Secretary, and the Lord Chancellor would then, if necessary, act upon the results of it (b). On the other hand, the Home Secretary has no sort of control over a clerk to the justices of the peace, and a petition to him alleging corruption on the part of that official is not privileged (c).

§ 88. Express malice.

As has been said above, a plea of qualified privilege can be rebutted by proof of express malice, and malice in this connexion may mean either (i) personal spite in the contents of the statement; or (ii) personal spite in the mode or extent of its publication. Mere carelessness is not malice (d).

Express malice.

(s) *Woodward v. Lander* (1834), 6 C. & P. 548.

(t) *Harrison v. Bush* (1855), 5 E. & B. 341; *R. v. Rule*, [1937] 2 K. B. 375.

(u) *James v. Boston* (1845), 2 C. & K. 4.

(a) *Ante*, §. 87 (vi).

(b) *Harrison v. Bush* (1855), 5 E. & B. 344, 350—351.

(c) *Blagg v. Sturt* (1846), 10 Q. B. 899. *Hebditch v. MacIlwaine*, [1894] 2 Q. B. 54, is to the same effect, although, like so many cases on qualified privilege, it may be, and indeed was, treated under another head of qualified privilege.

(d) *Gatley, op. cit.*, 640—641; *Odgers, op. cit.*, 283—284. *Fraser, op. cit.*, 150, cites *Smith v. Hodgeskins* (1633), Cro. Car. 276, for the state-

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(i) Evidence of spite may be found in the statement itself. But it does not follow that because the language used is excessive it is therefore malicious (e), and the law, in the interests of qualified privilege has certainly not weighed words in a hair balance; but if they are utterly beyond, and disproportionate to, the facts, that will rebut the privilege (f). Spite may also be inferred from the relations between the parties. Ill-feeling on the part of the defendant, whether recent or of long standing, whether shown before or after the commencement of the action, whether displayed in connexion with the statement itself or with any other matter, is here relevant as evidence (g).

(ii) Evidence of malice in the mode of publication is commonly illustrated by wider dissemination of the statement than is necessary, such as blazoning it abroad through the town-crier, circulating it on a postcard instead of in an enclosed letter, or saying it at the top of one's voice so that bystanders who have no interest in it overhear it (h). It should be observed that if a business communication is privileged, the privilege covers all incidents of the transmission and treatment of that communication which are in accordance with the reasonable and usual course of business. Here the law has taken account of changed commercial habits. In 1891 the Court of Appeal thought that it was not usual for an employer to dictate letters (which proved to be defamatory) to his clerk and they held that such communication was not privileged at all (i). But in *Osborn v. Boulter* (k) they declined to follow their earlier decision and held that the dictation of business letters to a typist had become reasonable and usual and that any defamatory statement made in the course of it was privileged.

ment that recklessness will negative privilege; it is possible that the facts in that case showed intention, but in any event recklessness is much more cognate to intention in the eye of the law than to mere carelessness, and Fraser's inference seems correct on that ground.

(e) Lord Esher, M.R., in *Nevill v. Fine Art, etc., Co., Ltd.*, [1895] 2 Q. B. 156, 170.

(f) *Spill v. Maulc* (1869), L. R. 4 Ex. 232, 236; *Adam v. Ward*, [1917] A. C. 309, 327, 330, 335.

(g) Odgers, *op. cit.*, 286—289.

(h) *Sadgrove v. Hole*, [1901] 2 K. B. 1; *Oddy v. Paulet* (1865), 4 F. & F. 1009.

(i) *Pullman v. Hill & Co., Ltd.*, [1891] 1 Q. B. 524.

(k) [1930] 2 K. B. 226. See p. 300, *ante*.

§ 89. Apology.

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Apology.

An apology for the defamatory statement by the defendant may mitigate damages, but it cannot affect his liability. He is quite entitled, apart from any statute, to make such an apology, and an Act of 1843, commonly styled Lord Campbell's Act (l), enables the defendant to employ what may be called a statutory apology. Section 1 provides that in any action for defamation the defendant, after duly notifying the plaintiff in writing of his intention to do so, may give evidence in mitigation of damages that he made or offered an apology to the plaintiff before the action began, or as soon afterwards as he had an opportunity of doing so if the action had commenced before he had such opportunity. Section 2 provides that in an action for libel contained in a newspaper or other periodical publication, the defendant may plead that he inserted the libel without actual malice and without gross negligence, and that he inserted in the publication a full apology (m). An Act of 1845 (n) amended section 2 by requiring that the defendant must pay money into Court by way of amends at the time of delivering the plea. It was held in *Hawkesley v. Bradshaw* (o) that the defence of justification could be pleaded as an alternative to the plea under section 2. Under the present rules of procedure, a defendant in any action for debt or damages may pay money into Court, with or without an admission of liability (p), and in an action for defamation it may be advantageous to the defendant to combine an apology with payment under this rule of procedure (q).

A full apology need not be an abject one, but it does at least require a complete withdrawal of the imputation and an expression of regret for having made it (r). To say that a man has manners not fit for a pig and then to retract that by saying that his manners are fit for a pig would merely aggravate damages.

(l) 6 & 7 Vict. c. 96.

(m) If the periodical is published at intervals exceeding one week, it is enough if he offered to insert the apology in any periodical publication selected by the plaintiff.

(n) 8 & 9 Vict. c. 75.

(o) (1880) 5 Q. B. D. 302.

(p) Rules of the Supreme Court (No. 2), 1933, as amended by R. S. C., 1934, No. 1. Note to Order XXII in Annual Practice.

(q) Gatlley, *op. cit.*, 410—411.

(r) See Odgers, *op. cit.*, 330—333.

CHAPTER XII

TRESPASS TO LAND

§ 90.

§ 90. Trespass to land is unjustifiable interference with possession of it.

Trespass defined.

It has been noticed already that trespass has other and wider meanings (a). In the old procedural language it included not only (i) trespass *quare clausum fregit* which we are now to discuss, but also (ii) trespass to the person which has been treated in Chapter IX, and (iii) trespass *de bonis asportatis*, or trespass to goods, which will be the subject of the next chapter. Thus the layman's idea of it as entry on another person's premises is too narrow. Three other lay fallacies had better be disposed of here.

Trespass is not a crime.

One is that trespass to land is also a criminal offence. The familiar legend on notice-boards, "Trespassers will be prosecuted", implies that it is a crime, but this may usually be dismissed as "a wooden lie". Yet in time past the idea was correct, for trespass of any sort was punishable by fine and imprisonment as well as redressible by an action for damages, and actually it was not until 1694 that the punitive element disappeared although it had faded into obsolescence long before that date (b). But nowadays trespass is never criminal except under special statutes which make it punishable: e.g., the 40s. fine which the by-law of a railway company fixes for trespass on its line.

Notice unnecessary.

Another delusion is that no one can be liable for trespass unless he has notice that he is trespassing. That is not so. He is liable whether he knows or does not know that he has no right there. Notice is relevant only in the sense that it may aggravate damages if the defendant has it and yet persists in going on the land.

Damage unnecessary.

Finally, trespass is actionable *per se*, i.e., without any proof of special damage. The popular idea that there is no liability unless perceptible harm is done to the land is erroneous. "Every invasion of property, be it ever so minute,

(a) *Ante*, § 1.

(b) Winfield, *Province of the Law of Tort*, 11.

is a trespass" (c). The old writ certainly refers to trespass "quare clausum fregit", i.e., alleges that the plaintiff's "close" has been broken, but there was never any need to prove that any physical thing had been broken. "For every man's land is in the eye of the law enclosed and set apart from his neighbour's: and that either by a visible and material fence, as one field is divided from another by a hedge; or by an ideal invisible boundary existing only in the contemplation of the law, as when one man's land adjoins to another in the same field" (d). §§ 90, 91.

The law, on the face of it, looks harsh, but trespass was so likely in earlier times to lead to a breach of the peace that even unwitting and trivial deviations on to another person's land were reckoned unlawful. At the present day there is, of course, much greater respect for the law in general and appreciation of the security which it affords, and the theoretical severity of the rules as to land trespass is hardly ever exploited in practice. It is true that "legal theory has nothing to do with the fact that a great deal of trespassing is tolerated by reasonable owners and occupiers as being substantially harmless" (e), but nobody except a churl would drag into Court a person who takes a short cut across his meadow without doing any visible injury to it. An Act of 1623 provides that if the defendant disclaims in his plea any title to the land and proves that the trespass was merely negligent or involuntary and that he had tendered sufficient amends before the action was brought, the plaintiff will be non-suited (f). But if the old case of *Basely v. Clarkson* (g) is still law, the Act is of little assistance to those who ramble on the country-side, for it was held there that "involuntary" is applicable only to cases like escape of cattle.

§ 91. Possession.

Trespass is an interference with possession (h). What then is "possession"? The analysis of this is important for the purposes not only of trespass to land, but also of trespass to

What is
possession?

(c) *Entick v. Carrington* (1765), 19 St. Tr. 1030, 1066.

(d) Blackstone, Comm., iii, 209—210.

(e) Pollock & Wright, *Possession* (1888), 45.

(f) Limitation Act, 1623 (21 Jac. 1, c. 16), s. 5. (This section is unaffected by the Limitation Act, 1939.)

(g) (1681), 3 Lev. 37.

(h) *Smith v. Miles* (1786), 1 T. R. 475, 480.

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chattels and of conversion of chattels; and what is said here may be taken as of general application to all three. This by no means exhausts the importance of possession in our system, for, although we are not concerned with such topics in this book, it appears also in the law of property where it is usually the foundation of ownership, and in criminal law where it is one of the plinths of the law of larceny. It may enrich a man and at one time interference with it by theft might hang a man.

Our law has a fairly good working scheme of possession although it has not indulged in much scientific dissection of the idea. Its weakest spot is its slovenly terminology. "Possession", "right of possession", "legal possession", "possession in law" (i), "right to possess", "constructive possession" (k), "physical possession", are phrases often occurring in the reports and some of them are often used interchangeably. The best monograph on the topic in English law is an *Essay on Possession in the Common Law* (1888), by the late Sir Frederick Pollock and Mr. Justice R. S. Wright, and frequent references to it will be made in this section (l).

Two kinds of possession.

Possession is of two kinds—possession in fact and possession in law, and the first of these has not the same degree of legal protection as has the second.

(1) Possession in fact.

(1) *Possession in fact*.—Other names for this are "custody", "detention", "*de facto* possession" (m). It may be defined as "any power to use [the thing] and exclude others, however small, . . . if accompanied by the *animus possidendi*, provided that no one else has the *animus possidendi* and an equal or greater power" (n).

In this sense it is quite possible to have *de facto* possession of a thing without any bodily contact with it. Of course you have such control over the clothes on your back and the book in your hand. But you also have it over articles that you can neither see nor touch, such as the papers and furniture in your office ten miles away from your house. And when we pass from chattels to land, it is obvious that a large estate or

(i) These first four terms generally mean the same thing—full legal possession.

(k) These two terms generally mean the same thing. They are considered, *post*, p. 313.

(l) Another valuable work is J. M. Lightwood's *Possession of Land* (1894).

(m) Or, in Roman Law, the "corpus".

(n) Terry, *Principles of Anglo-American Law* (1888), 268; cited with approval in Pollock & Wright, *op. cit.*, 13.

even a ten-acre field is quite incapable of complete physical comprehension by any one person, and yet there is no doubt that there may be such control as the law thinks sufficient. Moreover, on the definition stated above, there is no reason why such control may not extend to land in another continent. If I own land in Queensland, I may quite well be in possession of it, though I live in England, provided I have power to exclude others through my agents or through the Queensland police. But some sort of power to use the property and to exclude others there must be. Usually each case must be resolved upon its own facts and we can give only one or two examples here. Formerly, a lessee of land who had not yet entered upon it could not sue in trespass, for although he had certainly got the right to enter, he had not got any physical control (o). He had the right to possession, but not the right of possession; but the Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 149 (2), seems to have reversed this rule. Fish cannot be regarded as in my physical control if, although they are encompassed by my net, there is a seven fathom gap in it through which they escape into your net (p).

Where facts leave it uncertain which of several competing claimants has *de facto* possession, legal possession is in him who can prove title, *i.e.*, who can prove that he has the right to possess. "If there are two persons in a field, each asserting that the field is his, and each doing some act in the assertion of the right of possession, and if the question is, which of those two is in actual possession, I answer, the person who has the title is in actual possession, and the other is a trespasser" (q). Whether a railway passenger has *de facto* possession of his seat in a carriage is matter of conjecture. He probably does not acquire possession of his seat merely by putting his hat, his newspaper or his umbrella there. If he is absent, and another passenger takes the seat, it is he who has possession of it, if any passenger can have that right. What the railway company undertakes to provide is a seat, not any particular seat, and it is only when the seat is occupied that the occupier has *de facto* possession. But it is arguable that having taken the seat by such occupation, the passenger

(o) *Harrison v. Blackburn* (1864), 17 C. B. (N.S.) 678.

(p) *Young v. Hichens* (1844), 6 Q. B. 606. The whale fishery depends upon special custom.

(q) Maule, J., in *Jones v. Chapman* (1847—1849), 2 Ex. 803, 821. Cf. *Hegan v. Carolan*, [1916] 2 Ir. R. 27.

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gets at least *de facto* possession and that, after the journey has begun, he can retain it by leaving some article there, if he quits it for some temporary purpose like dining in the restaurant car (r).

It may be that neither of the rival claimants to an article has any right to possess; if so, mere physical control by either of them does not amount to possession. At a bargain sale, Jane picks up a dress and decides to buy it. She puts it down momentarily on the counter and goes to fetch a shop-assistant to signify her wishes to him. Meanwhile Ann picks it up, decides to buy it and is taking it to another assistant when she is intercepted by Jane, who tries to snatch it from her. Here the right to possess is in neither Jane nor Ann, but in the shopkeeper. Neither of them has a shadow of title to the dress in the absence of any contract with the shopkeeper, who retains both *de facto* possession and possession in law.

Protection of
de facto
possession.

How far does the law protect a person who has mere *de facto* possession? A common example is a domestic servant with respect to his employer's plate and cutlery. Mere *de facto* possession confers no rights, but this is subject to a very important qualification. The mere *apparent* possession of such a person gives him all the remedies of a possessor as against strangers, and therefore he can sue trespass against every one except him who can show a present right to possession. Further, as we shall see when we come to deal with conversion, he can maintain *detinue* or *trover*, and it is useless for the stranger to plead *jus tertii* unless he can also prove that a third person was entitled to the possession and that he, the stranger, acted with his authority (s). As against his lessor, the lessee of land, who is in occupation of it, has possession in law (defined in the next paragraph), and he can maintain an action for trespass against the lessor, if the latter

(r) Salmond, Torts, § 48 (2), denies possession to the passenger in any circumstances on the ground that he has merely the use of the seat. But this seems to be an inadequate reason. If I hire a cushion in order to sit upon it for a definite period, *e.g.*, during a football match, I am a bailee of it and have not only *de facto* possession of it but also possession in law; yet I have nothing more than the use of it. The real doubt with respect to the railway passenger seems to be, not whether he has got *de facto* possession, but whether he has not also got full possession in law; since *Hurst v. Picture Theatres, Ltd.*, [1915] 1 K. B. 1, it is arguable that he has; there, Kennedy, L.J., thought that Hurst had possession of his seat in a theatre (at p. 14). *Butler v. M. S. & L. Ry.* (1888), 21 Q. B. D. 207, merely decides that a railway passenger has no easement to travel over the line.

(s) Pollock & Wright, *op. cit.*, 147—148.

makes an entry on the land which is not authorised by the lease or by the express or implied consent of the lessee; but if the lease is an oral one, which ought to have been in writing under the Law of Property Act, 1925, s. 40, and the lessee's only method of proving possession is by giving oral evidence of the lease, he cannot maintain an action for trespass against the lessor, although his mere *de facto* possession would enable him to sue a third party for trespass (t).

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(2) *Possession in law*.—This is also known as “legal possession”. Possession in fact is *prima facie* evidence of possession in law, but it is not conclusive evidence of it, for possession in law is something more. It has been settled time out of mind that a servant, as such, has not possession in law, for he lacks the intent (described below) necessary to constitute it. Not but what the nature of his holding may be such as to promote him to the higher position of possessor in law (u). If he is a bailee of his employer's goods for a definite time, then, like all other such bailees, he has possession in law; but not if he is only a bailee at the will of the bailor, for there possession in law remains in the bailor. In general, a bailee, whether for reward or not (v), gets legal possession; and whether there is a bailment at all must depend on the terms upon which the thing was handed to him. A hundred years ago, the master of a ship employed by the shipping company was bailee of the vessel and had legal possession of it (a). But nowadays when ships do not pass beyond the control of their owners on foreign voyages, he is not a bailee and has mere custody of the ship (b).

(2) Possession in law.

What, then, is the distinction between possession in fact and possession in law? It is the presence of a certain mental element. For possession in law there must be “*a manifest intent, not merely to exclude the world at large from interfering with the thing in question, but to do so on one's own account and in one's own name*” (c). Whether this intent exists or not must generally be a question of fact, but we have

Intention.

(t) *Delaney v. Smith, Ltd.*, [1916] 1 K. B. 393, 397.

(u) *Pollock & Wright, op. cit.*, 20, 26, 138.

(v) *Rooth v. Wilson* (1817), 1 B. & Ald. 59. is here more acceptable than *Lotan v. Cross* (1810), 2 Camp. 464; cf. *The Winkfield*, [1902] P. 42, 59–60.

(a) *Moore v. Robinson* (1831), 2 B. & Ad. 817. As to charter of a ship, see *Dean v. Hogg* (1834), 10 Bing. 345.

(b) *The Jupiter* (No. 3), [1927] P. 122, 131; affirmed, [1927] P. 250.

(c) *Pollock & Wright, op. cit.*, 17.

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just seen that in at least two legal relations the law has settled that it does not—the servant and the bailee at will. An example on the other side of the line would be purchase of a pot of beer. When it is handed to me I am still in possession of it even if one condition of getting it is that I am bound to drink its contents on the publican's premises (*d*).

It is doubtful whether a lodger has possession of his rooms. There are conflicting *dicta*, but probably the law is this (*e*): if a specific room has been allotted to him he has possession, unless, like an undergraduate in lodgings, "attendance" is provided for him (*f*), or unless the landlord has exclusive control of the outer door (*g*). But if he has no such specific room, he has not possession and cannot maintain trespass. A guest at an inn apparently has not possession of the room allotted to him unless he has acquired that right under some express or implied agreement (*h*).

Does possession involve knowledge?

Does the mental element in possession include knowledge that one has possession? Is it possible for me to have possession of anything when I am totally ignorant of its existence? A complete answer to this is not possible, for the authorities are in some confusion.

Possession of land implies possession of everything on or below it which may be regarded as part of the soil whether the possessor is aware of its existence or not (*i*). In the law of tort at any rate, there is no reason why, on principle, this should not apply to possession of a chattel whether it is on, or in, land or is on the person of the possessor. Surely a baby has possession of its rattle, or a lunatic of his coat, although defective intellect in either case may make it impossible to say that he knows that he has got anything. It may be objected that intention of some sort is one ingredient of possession, and that if you do not know that you have a thing, you cannot form any intention about control over it. That is true and we can evade the difficulty only by saying that the

(*d*) *Wellaway v. Courtier*, [1918] 1 K. B. 200, is to the same effect.

(*e*) Clerk & Lindsell, *Torts*, 512-513; *Foa, Landlord and Tenant* (6th ed. 1924), 9-10; Woodfall, *Landlord and Tenant* (24th ed. 1939), 10-11; Salmond, *Torts*, § 48 (2).

(*f*) *Smith v. Overseers of St. Michael, Cambridge* (1860), 3 E. & E 388, 390-391.

(*g*) *R. v. St. George's Union* (1871), L. R. 7 Q. B. 90, 98.

(*h*) *Foa, Landlord and Tenant* (6th ed. 1924), 9.

(*i*) *Elwes v. Brigg Gas Co.* (1886), 33 Ch. D. 562; *South Staffordshire Water Co. v. Sharman*, [1896] 2 Q. B. 44, 46-47; Pollock & Wright, *op. cit.* 41.

law, in the interests of common justice, will easily presume intention from apparent control.

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At any rate, the decided cases, upon the whole, support the principle that knowledge is not essential to possession.

A man who has possession of a chattel containing property has possession of that property even if he does not know of its presence there: *e.g.*, a purse of money in the secret drawer of a bureau. If the owner of the bureau sells it to another, the buyer does not acquire, as against him, any lawful possession in the purse (*k*). There is a *dictum* in the later case of *Bridges v. Hawkesworth* (*l*) which is inconsistent with this. There, a finder of banknotes which had been dropped by some untraceable owner on the floor of a shop was held to have a good title to them as against the shopkeeper who did not know of their presence; and one of the reasons given for the decision was that "the notes never were in the custody of the defendant, nor within the protection of his house before they were found" (*m*). But this *dictum* was unnecessary to the decision which was simply that the right to possess the notes was, as against the shopkeeper, in the finder; and even on that point the decision, as will be seen later (*n*), was probably bad law. But, sound or unsound, it was concerned with a competition as to the right to possess and not as to possession.

So much for the law of tort. Some *dicta* in criminal cases are contrary to the rule suggested above (*o*), but there are *dicta* the other way even in the same case (*p*). However, it is wiser to recognise that the position in criminal law is uncertain than to attempt to reconcile it with the law of tort. No one can be convicted of larceny unless he has "taken possession" of the thing alleged to have been stolen. Judges in criminal cases have therefore constantly had to deal with questions of possession, and when it is recollected that at one time the solution of these questions may have meant the

Possession
in criminal
law.

(*k*) *Merry v. Green* (1841), 7 M. & W. 623, 631 ("there was no delivery so as to give a lawful possession of the purse and money"). See, too, *Cartwright v. Green* (1803), 8 Ves Jun. 406.

(*l*) (1851), 15 Jur. 1079.

(*m*) 15 Jur. 1089.

(*n*) *Post*, p. 359.

(*o*) *E.g.*, *Cave, J.*, in *R. v. Ashwell* (1885), 16 Q. B. D. 190, 201 ("a man has not possession of that of the existence of which he is unaware").

(*p*) *Stephen, J.*, *ibid.*, 210 *R. v. Hudson*, [1943] K. B. 458, 462, conclusively settles that, in the law of larceny, if X receives from Y goods which were not intended for him, X does not "take" possession of the goods unless and until he discovers the mistake and then appropriates them.

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difference between hanging a man or setting him free, it is not remarkable that it is approached in a method different from that in questions of civil liability. Take the case of Benjamin into whose sack of corn Joseph inserted a cup without Benjamin's knowledge; or the case of the bishop into whose coat pocket a thief, without the bishop's knowledge, inserted a purse in order to escape detection. So far as the law of tort is concerned it is an intelligible and sensible proposition to say that Benjamin and the bishop have got legal possession of the cup and the purse respectively and the right to retain them as against any one except their true owners; and that is probably what the law is. If it were otherwise, any one could take the articles from the unwitting possessor with impunity. But so far as criminal law is concerned, no one in his senses would say that Benjamin or the bishop has "taken possession" of the goods while ignorant of their presence and has thus committed larceny. Are we then to say that with respect to the same article one man may have possession in the law of tort and another man may have it in criminal law? No, for we are forbidden by both English and Roman law to assert that two different persons (not being joint owners) can at the same time have possession in the same thing. "Possession is single and exclusive" (q). But we put forward no heretical and damnable doctrine if we say that the exigencies of our criminal law, with its crabbed definition of larceny, have forced Judges to treat possession in criminal law on lines that are not entirely the same as those in civil law, and that even in criminal law taken by itself they have not completely settled ideas on the point (r).

Vicious
possession
protected.

It is a commonplace of our law that it protects not only possession which originated lawfully but also, up to a certain point, a thoroughly vicious possession. A thief who steals my watch has a possession which the law will protect against every one except me or some person acting lawfully on my behalf.

(q) Pollock & Wright, *op. cit.*, 20. But it is possible for A to have possession in law and for B at the same time to have possession in fact; and in certain circumstances B may be allowed the remedies of the possessor in law, although he is not one. *E.g.*, while A is away on a holiday, B, without A's knowledge, wrongfully occupies A's house. Here A has possession in law and B has possession in fact, however vicious its origin may have been. Now, if C, a third party, ejects B, he is presumably liable in trespass not only to A but also to B, because the law confers upon B the remedies of a possessor in law, although in truth he is only a possessor in fact. Cf. Pollock, *Torts*, 309, note (k).

(r) Pollock & Wright, *op. cit.*, 108—114.

Why the law does this is part of a wider question, "Why does it protect possession at all?" Several reasons have been assigned for this (s). We cannot go into them here, but so far as the thief is concerned a quite sufficient answer is that if his possession were unprotected, breaches of the peace would almost certainly be encouraged.

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A relevant point in this connexion is the moment at which a wrongdoer can be said to acquire possession. None passes at the moment of snatching or grabbing. A thief, apart from criminal liability, certainly does not get possession of my purse the instant that he takes it, or while I am in pursuit of him. Beyond that it must be a question of fact whether I have acquiesced in his holding of it so as to confer upon him possession as against people other than myself. "A mere trespasser cannot, by the very act of trespass, give himself what the law understands by possession against the person whom he ejects." The authorities of a school lawfully dismiss the schoolmaster who leaves accordingly, but returns next day, breaks into the school, holds it for eleven days and is then forcibly ejected by the authorities who never acquiesced in his entry and showed no delay in disputing his claim to re-enter. Here the schoolmaster never regained the possession which he had surrendered (t).

Moment of acquisition.

Right to possess.—This term, a variant of which is "constructive possession", has no very clear-cut meaning (u), but in general it signifies a lawful title to retain possession when one already has it, or to acquire possession when one has not at present got it. It may, therefore, accompany possession or be independent of it. It is one of the elements of full ownership, but an owner may nevertheless be without it. Thus, if he has bailed goods to another for a definite period of time, or if he has leased land to another for a term of years, the right to possess during such periods is in the possessor—the bailee or lessee respectively (a).

Right to possess.

The better view is that one who has merely the right to possess, without actually having possession, cannot sue for trespass and that the alleged exceptions to this rule are unreal. Thus it is true that the owner of goods which are in the custody of his servant can sue trespass against a third person who

(s) Pollock & Maitland, *Hist. of English Law* (2nd ed. 1898), ii, 40 seq.

(t) *Browne v. Dawson* (1840), 12 Ad. & E. 624, 629.

(u) Pollock & Wright, *op. cit.*, 27.

(a) *Ibid.*, 145.

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Trespass by relation.

takes the goods from the servant, but that is because he has never parted with full legal possession to the servant (b).

Trespass by relation.—One who has a right to possess is, by a legal fiction, deemed, when he enters, to have been in possession from the moment when his right of entry accrued. He is thus enabled to sue for any act of trespass committed while he was out of possession. The fiction was necessary because, owing to the superiority attributed by the older law to possession as contrasted with ownership, an owner out of possession was without remedy against a trespasser (c).

A reversioner, as he has not possession, cannot sue for trespass unless the wrong is of such a nature as permanently to affect the value of his interest in the land, *e.g.*, cutting down trees or pulling down buildings (d). So, too, joint tenants or tenants in common cannot sue each other for trespass, as each and all are entitled to possession, but trespass is maintainable if the wrong amounts to ouster of the aggrieved co-owner or to destruction of the property; and merely locking the gate of a common field is no more an ouster than cutting and carrying away the grass in it are destruction of the field (e). But even where the action of trespass is inapplicable, there may be other remedies (f).

What constitutes interference.

§ 92. Interference in trespass.

Interference with the possession of land sufficient to amount to trespass may occur in many ways. The commonest example is unauthorised walking upon it or going into the buildings upon it. But there need be no entry; mere touching may be enough. A puts a heap of damp rubbish on his own land. As the heap dries it sinks and touches the wall of B, a neighbour. A has committed trespass (g). So, too, propping a ladder against a neighbour's wall may be trespass (h). Again, trespass may be perpetrated through any agency, animate or inanimate, *e.g.*, one's servant, cattle or movables. The rules as to cattle trespass are so minute and peculiar that the topic will be dealt with in Chapter XX

(b) *Ibid.*, 145—147.

(c) Clerk & Lindsell, *Torts*, 514—517.

(d) *Barter v. Taylor* (1832), 4 B. & Ad. 72; *Cooper v. Crabtree* (1882), Ch. D. 589.

(e) *Jacobs v. Seward* (1872), L. R. 5 H. L. 464.

(f) Lindley, *Partnership* (10th ed. 1935), 27 *seq.*

(g) *Gregory v. Piper* (1829), 9 B. & C. 591.

(h) *Westripp v. Baldock*, [1938] 2 A. E. R. 779.

on the liability for animals. The one restriction on trespass is that the injury must be direct and immediate. If it is indirect or consequential, there may well be a remedy (usually for nuisance or for negligence), but whatever it is it will not be trespass. If I plant a tree on your land, that is trespass. But if the roots or branches of a tree on my land project into or over your land, that is a nuisance (i).

Another form of trespass to the surface of land is improper use of the highway. The road surface is frequently in the charge of a highway authority (k), but that does not exclude possession of the soil by private owners (l). If a man's land abuts upon the highway he is presumed to own the soil over which the highway goes, and he can maintain an action of trespass against any one who injures him by using the highway in an unreasonable manner.

Trespass on
highway

Thus, in *Harrison v. Duke of Rutland* (m), the Duke owned moors including the soil of a highway which intersected them. Harrison, who had some grievance against the Duke, revenged himself by standing on the highway near to some shooting butts on the moors and scaring off grouse as they were flying towards the butts, when the Duke had shooting parties there. Harrison was held to be a trespasser. Lopes, L.J., seems to have put the right of the landowner too high in one respect and too low in another when he said: "The interest of the public in a highway consists solely in the right of passage" (n); for the highway may be used for purposes other than mere passing and repassing without committing an illegal wrong against the adjacent landowner, and, as will be seen shortly, even passing and repassing may amount to an illegal wrong in certain circumstances. A broader and more acceptable statement was that of Lord Esher, M.R.: "Highways are, no doubt, dedicated *prima facie* for the purpose of passage; but things are done upon them by everybody which are recognised as being rightly done, and as constituting a reasonable

(i) *Smith v Giddy*, [1904] 2 K B 448, 451 As to removal of the intruding growth, see § 34, *ante*

(k) As to their rights, see *Tunbridge Wells (Mayor of) v Baird*, [1896] A C 434, and, in general, Pratt & Mackenzie, *Law of Highways* (18th ed.), 60 *seq.*, 16 Halsbury, *Laws of England* (2nd ed.), §§ 299-301 Cf 6 Camb L J 162-164

(l) What follows is taken from an article by the author in 47 *Law Quarterly Review* (1931), 24-26

(m) [1893] 1 Q. B. 142 (W. Cases, 128).

(n) *Ibid.*, 152.

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and usual mode of using a highway as such. If a person on a highway does not transgress such reasonable and usual mode of using it, I do not think that he will be a trespasser" (o). But Lord Esher had no more doubt than his legal brethren that Harrison's employment of the highway was unreasonable and unusual (p). His statement was cited with approval in *Hickman v. Maisey* (q) where the Court of Appeal again held that the defendant had committed trespass. He had walked to and fro on the highway for a space of some fifteen yards during about an hour and a half in order to watch and take notes of some racehorse trials on the plaintiff's land adjoining the highway.

Of course it is likely to be a puzzling question of fact whether some modes of using the highway are reasonable or not (r). Making a sketch from it has been the subject of conflicting dicta (s), but surely the lawfulness of this must depend on time, place and circumstances. So, too, with a shop window. It may reasonably attract prolonged inspection, but not indefinite staring. We are confining attention here to user of the highway *qua* the adjacent landowner. But it must be noted that some uses of it which would be no legal wrong against him, may nevertheless be a nuisance or obstruction to the highway.

Although a person may be a trespasser on the highway as regards the owner of the soil, that does not release drivers of vehicles on the highway from their duty to take care towards him. Thus, in *Farrugia v. G. W. Ry.* (t), the driver of the defendants' lorry, which was loaded with a large box that made the lorry too high to get under a bridge over the highway,

(o) [1893] 1 Q B 146-147 Unless 'and usual' is merely pleonastic, it is difficult to see why it is tacked to "reasonable". If I crawl rapidly on all fours on the highway past X's land, it is not a trespass against him, for although it is a very 'unusual' mode of travelling it is not an "unreasonable" one.

(p) In the New York Case of *Adams v. Rivers* (1851), 11 Barb 390, defendant was held to be a trespasser because he stopped on the highway in front of the plaintiff's house and uttered abusive language of him.

The American Restatement of the Law of Torts (1934), Vol 1, § 192, is to the same effect as English law.

(q) [1900] 1 Q B 752 755 758

(r) [1900] 1 Q B 756 Cf Professor Goodhart, in 6 Camb L J 161-174

(s) A L Smith, L J, in *Hickman v. Maisey*, [1900] 1 Q B 752, 756, Kay, L J, in *Harrison v. Duke of Rutland*, [1893] 1 Q B 142 156; Slesser, L J, in *Little v. Yorks (North Riding) C C*, [1934] 2 K B 101, 126-127

(t) [1947] 2 A E R 565

tried to drive the lorry under the bridge, but the box collided with it and fell upon and injured a boy who was running behind the lorry. He had been on the lorry as a trespasser, had just got off it and was running behind it with a view to stealing another ride. The Court of Appeal held that the defendants were liable to the boy for negligence, even assuming that he was a trespasser with respect to the owner of the highway soil.

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In *Harrison v. Rutland* and *Hickman v. Maisey* (*supra*), the landowners owned the land on each side of the adjacent highway. We have to consider the case of a person who owns land on one side only. Here the law presumes that he owns the highway *usque ad medium filum viae* (i.e., from the boundary of his land to the middle of the adjacent highway). Therefore he cannot sue for trespass a person who makes improper use of the half of the highway which is beyond the middle. It seems unsatisfactory to make the availability of the action for trespass depend on whether the defendant is on one side of the middle of the road or on the other, for the annoyance to the plaintiff may be the same in either case. Perhaps the tort of nuisance would cover such cases, but the cheapest and most effective way of dealing with such conduct would be to make it punishable on summary conviction (u).

Another point to be noted is that, where the owner of the land adjacent to the highway has let it to another person, it is presumed that the lease includes the owner's rights with respect to the whole or (as the case may be) the half of the adjacent highway (v). It is submitted that, on principle, the lessee, as he has possession, should be able to treat as a trespasser one who abuses the right of using that part of the highway of which the lessee is in possession (a).

Any intrusion upon the subsoil is just as much a trespass as entry upon the surface, and subsoil and surface may be possessed by different persons. If A is in possession of the

Trespass to
subsoil.

(u) Borough and county councils have statutory powers to make by-laws for prevention and suppression of nuisances which are not already summarily punishable: *Encyclopædia of Local Government* (1907), Vol. 4, p. 615. For the whole topic, see Lord Macmillan, *Local Government Law* (1936), VI, 343-430.

(v) 16 Halsbury, *Laws of England* (2nd ed.), § 292.

(a) No decision exactly in point is traceable. The *dicta* in *Hadwell v. Righton*, [1907] 2 K. B. 345, 346, 349, and in *Higgins v. Searle* (1909), 100 L. T. 280, 281, are not inconsistent with the view I suggest, for those cases related merely to injuries sustained by lawful users of the highway, owing to the escape of cattle from land adjoining the highway.

§ 92.

Interference
with air-
space.

surface and B of the subsoil, and I walk upon the land, that is a trespass against A, but not against B. If I dig holes vertically in the land, that is a trespass against both A and B. If I bore a tunnel from my land into B's subsoil, that is a trespass against B only (b).

Air-space (c).—Interference with the air-space over land is a topic that presents several conundrums. As to the intrusion into it of things other than aircraft, the Common Law is somewhat uncertain, and as to aircraft it is almost unknowable.

We had better begin by dealing with one of those unfortunate scraps of Latin that has become nothing but a clog round the neck of development of our law. It is the maxim, *cujus est solum ejus est usque ad coelum*. If it were anything like the truth, the law would be simple enough, for the slightest entry into the air-space over one's land would be trespass, whatever other tort it might or might not be. But it is almost certainly too wide. Sir Arnold McNair's research into it may be thus summarised (d). A possible source of it is said to be Rabbi Akiba in Jewish law, A.D. 70, and it is also alleged that references to it appear in Deuteronomy and Isaiah. However that may be, the maxim is not Roman and has not been traced in comments on Roman law earlier than the Gloss of Accursius (c. A.D. 1220) on the Digest, or in English law earlier than 1586 (e). In itself it has no authority in our law and it has been grievously misunderstood and misapplied so far as the upward limit is concerned; for it confuses air, which is capable of reduction to ownership (e.g., by liquefaction) with space, which is not (f). All that it means is that

(b) *Cor v. Glue* (1848), 5 C. B. 533.

(c) The best treatment of the topic is in Sir Arnold McNair's monograph, *The Law of the Air* (1932), 19—35, 74—76, 94—99. See also Moller, *Law of Civil Aviation* (1936), Chaps. V, VI; Shawcross and Beaumont, *Air Law* (1945), ss. 397—398, 416—419; Hazeltine, *Law of the Air* (1911), pp. 54—94. The periodical literature is voluminous. There are at least two journals solely concerned with the legal aspect—the *Air Law Review*, published in New York, and the *Journal of Air Law*, published in Chicago; and the articles in these and in the law reviews generally are indexed under "Aerial Navigation" in the *Index to Legal Periodicals* (ed. Eldon R. James, American Association of Law Libraries). See especially E. C. Sweeney in 3 *Journal of Air Law*, 329—373, 531—625; F. D. Fagg, Jr., *ibid.*, 400—410; E. S. Thurston in *Harvard Legal Essays* (1934), 501—536; A. L. Newman II in 29 *Columbia Law Review* (1929), 1039—1051.

(d) *Law of the Air*, Chap. II.

(e) *Bury v. Pope*, Cro. Eliz. 118.

(f) But it is not clear why space, if its common meaning of "extent of length, breadth and thickness, irrespective of its contents" be taken,

if one owns a portion of the earth's surface, one also owns anything below or above that portion which is capable of being reduced into private ownership (g).

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Next, we may take a distinction between intrusion into the air-space (i) by things other than aircraft, and (ii) by aircraft, for the latter is to some extent governed by statute.

(i) Is it possible for intrusion by things other than aircraft to amount to trespass? If the injury is direct and immediate and the air-space is in the plaintiff's possession, the answer must be "Yes". But how much of the air-space is capable of ownership or possession? Sir Arnold McNair suggests two theories (h): (1) *Prima facie* a surface-owner has ownership of the fixed contents of the air-space and the exclusive right of filling the air-space with contents. (2) The same as (1) but with the addition of "and ownership of the air-space within the limits of an 'area of ordinary user' surrounding and attendant upon the surface and any erections upon it". He admits that for practical purposes there is not much difference between the theories, but prefers the first, because the second involves the ownership of space, the possibility of which he strongly doubts. We venture to prefer the second theory because we find it hard to share the learned author's doubts (i).

(i) Otherwise than by aircraft.

If, then, A projects anything into B's area of ordinary user, that ought to be trespass, and upon the whole the authorities support this view. The only case against it is *Pickering v. Rudd* (1815) (k), where Lord Ellenborough, C.J., ruled that the defendant was not liable in trespass for having nailed to his own house a board which projected over plaintiff's land; for, said he, if this were trespass so would the passage of a balloon be. We need not spend time on criticising this analogy, for the current of later decisions is, with one doubtful exception, the other way (l), and whether the intrusion be by an illuminated sign (m), a horse's hoof or mouth (n), a

should be incapable of ownership. Surely a vacuum in an exhausted receiver is just as capable of ownership as air in a bottle.

(g) For the application of the maxim in conveyances of property, see Moller, *op. cit.*, 176—181.

(h) *Op. cit.*, 34—35.

(i) *Ante*, note (f).

(k) 4 Camp. 219.

(l) Blackburn, J., in *Kenyon v. Hart* (1865), 6 B. & S. 249, 252, could see no legal reason for Lord Ellenborough's view.

(m) *Gifford v. Dent*, [1926] W. N. 336.

(n) *Ellis v. Loftus Iron Co.* (1874), L. R. 10 C. P. 10.

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telephone wire (o), or any other object, it is trespass, provided that what is invaded is the area of ordinary user and that the injury is direct and immediate. A decision not entirely in accordance with this is *Clifton v. Viscount Bury* (p) in which Hawkins, J., held that, although bullets traversing the plaintiff's land at a height of seventy-five feet on their way to their military target might give rise to an action for nuisance, yet this was not "a trespass in the strict technical sense of that term" (q). This would be intelligible enough if the projectiles had been shells with a trajectory of some thousands of feet, for they might well be above the area of ordinary user, just as skywriting by an aeroplane would be (r); but seventy-five feet upwards would seem to be well within that area; however, Hawkins, J., appears to have been following *Pickering v. Rudd* (s).

If the injury is not direct, but consequential, the tort will be, not trespass, but nuisance, or possibly a breach of the strict duty embodied in the rule in *Rylands v. Fletcher* (t), or negligence. It is nuisance if portions of one's trees or buildings overlap a neighbour's boundary and thereby do damage (u), and where rain is likely to fall from the projection there is no need to prove that it has done so, for the Courts "will take judicial notice that rain falls from time to time" (a). If the intruding vegetation is poisonous it will come within the rule in *Rylands v. Fletcher* (b).

(ii) By aircraft.

(ii) *Aircraft*.—Here the rules are partly to be deduced from the Common Law and partly to be found in legislation.

(o) *Wandsworth Board of Works v. United Telephone Co., Ltd.* (1884), 13 Q. B. D. 904; *Finchley Electric Light Co. v. Finchley U. D. C.*, [1903] 1 Ch. 437.

(p) (1887), 4 T. L. R. 8.

(q) *Ibid.*, 9. He held that it was trespass as to bullets which actually fell upon the land.

(r) Lord Dunedin, in a letter to *The Times*, cited in *McNair, op. cit.*, 34. note.

(s) *Supra*. Of course firing a bullet at any one on another's land is an assault, and unless the person aimed at knew that he was out of range it would not matter how high the bullet went.

Note that the American Restatement of the Law of Torts (1934), Vol. 1, p. 366, makes an unprivileged intrusion in the air-space at any height above the surface of a trespass; but to aircraft other rules apply. *Post*, p. 322. note (p).

(t) (1868), 3 H. L. 330 (*post*, § 140).

(u) *Smith v. Giddy*, [1904] 2 K. B. 448; *Lemmon v. Webb*, [1894] 3 Ch. 1; [1895] A. C. 1; *Noble v. Harrison*, [1926] 2 K. B. 332, 337, 340; *Butler v. Standard Telephones, etc., Ltd.*, [1940] 1 K. B. 399; *Penrude's Case* (1598), 5 Rep. 100; *Baten's Case* (1610), 9 Rep. 53.

(a) *Fay v. Prentice* (1845), 14 L. J. C. P. 298, 299.

(b) *Crowhurst v. Amersham Burial Board* (1878), 4 Ex. D. 5.

As to the Common Law, there is not one single reported English decision (as distinct from *dicta*) discoverable. And the *dicta* are appropriate to an era when aircraft were generally either spectacular toys or disastrous scientific experiments (c). All that one can do, therefore, is to make a probable prediction of the lines upon which the Courts will treat the activities of aircraft. Analogy may help up to a point, but it may mislead, for we are faced by something which in noise, speed and detachment from the earth's surface is scarcely comparable with an overhanging building or tree, but which is destined to become as common a mode of locomotion as a railway train. However, no real reason can be urged why the general principles which have just been put forward with respect to other things should not apply with certain modifications to aircraft.

§ 92.

(a) At
Common
Law.

In the first place, it is improbable that aircraft are to be regarded as things dangerous in themselves (d). Next, it is submitted that trespass will be committed by them to the air-space if they fly so low as to come within the area of ordinary user (e). Certainly, if the aircraft or anything from it falls or descends upon the land, that is trespass. Again, if its passage interferes with the reasonable use and enjoyment of land, that is a nuisance (f). Finally, if the requisites of the tort of negligence are satisfied, then such passage through the air, or impact with the earth, may amount to it, and it is urged by Sir Arnold McNair that the rule of evidence known as *res ipsa loquitur* would then apply (g). Presumably inevitable accident would be a defence.

So far we have indicated what is possibly the Common Law. With respect to *privately* owned aircraft, the Air Navigation Act, 1920 (h), provides: "No action shall lie in respect of trespass or in respect of nuisance, by reason only of the flight of aircraft over any property at a height above the ground, which, having regard to wind, weather, and all the circumstances of the case is reasonable, or the ordinary incidents of such flight; . . . but where material damage or

(b) By
statute.

(c) *E.g.*, Lord Ellenborough, C.J., in *Pickering v. Rudd* (1815), 4 Camp. 219, 220—221; Blackburn, J., in *Kenyon v. Hart* (1865), 6 B. & S. 249, 252.

(d) McNair, *op. cit.*, 55, 66.

(e) I believe this is to be inferred from McNair, *op. cit.*, 31, 66.

(f) *Ibid.*, 39, 48, 66.

(g) *Ibid.*, 48—52, 66. A view taken, but not unqualifiedly, by Goddard, J., in *Fosbrooke-Hobbes v. Airwork, Ltd.* (1937), 52 T. L. R. 254.

(h) 10 & 11 Geo. 5, c. 80, s. 9 (1).

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loss (i) is caused by an aircraft in flight, taking off, or landing, or by any person in any such aircraft, or by any article or person (k) falling from any such aircraft, to any person or property on land or water, damages shall be recoverable from the owner of the aircraft in respect of such damage or loss, without proof of negligence or intention or other cause of action, as though the same had been caused by his wilful act, neglect or default (l), except where the damage or loss was caused by or contributed to by the negligence of the person by whom the same was suffered". This, as Sir Arnold McNair points out, creates a new statutory tort (m).

Another section of the Act (n) makes the flying of aircraft, so as to cause unnecessary danger to any person or property, punishable on summary conviction (o).

The Act has no application to aircraft belonging to or exclusively employed in the service of His Majesty (p).

The Air Navigation Act, 1936, contains provisions limiting the liability for damages caused by private aircraft, and amending the Act of 1920 as to the right of the owner of the aircraft to recover an indemnity from the person who caused the damage (q).

Continuing
trespass.

Continuing trespass.—Trespass, whether by way of personal entry or by placing things on the plaintiff's land may be

(i) "Damage or loss" includes, in relation to persons, loss of life and personal injury: Air Navigation Act, 1936 (26 Geo. 5 & 1 Edw. 8, c. 44), s. 34 (3).

(k) The words "or person" were inserted by the Air Navigation Act, 1936 (26 Geo. 5 & 1 Edw. 8, c. 44), 5th Sched.

(l) Does this exclude inevitable accident as a defence? I think that it is arguable that it does not. Sir Arnold McNair does not expressly deal with the point, but he regards liability as "absolute" apart from the defences mentioned in the section itself and apart from *volenti non fit injuria* (op. cit., 68, 81—82). He urges that necessity should be a defence (where it is proved) to harm occurring in flight, as distinct from contact with the land (75—76).

(m) *Op. cit.*, 78.

(n) S. 10.

(o) It was under this section apparently that a Lincolnshire farmer, who dropped an egg from an aeroplane, was convicted in June, 1934: *The Observer*, July 1, 1934.

(p) S. 18.

The American Restatement of the Law of Torts (1934), Vol. 1, p. 367 and § 194, contains rules much like those in our Air Navigation Act. Where, however, there is contact and damage inflicted thereby, inevitable accident seems to be excluded as a defence, because the operation of aircraft is reckoned at the present time as "an extra-hazardous activity". The Restatement is concerned with the Common Law; it does not deal with the air legislation in the separate States.

(q) S. 15 and 5th Sched.

“continuing” and give rise to actions *de die in diem* so long as it lasts. In *Holmes v. Wilson* (r), highway authorities supported a road by wrongfully building buttresses on the plaintiff’s land, and they paid full compensation in an action for trespass. They were nevertheless held liable in a further action for trespass, because they had not removed the buttresses. Nor does a transfer of the land by the injured party prevent the transferee from suing the defendant for continuing trespass (s).

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Mere omission to remove something from the land which was lawfully there to begin with is not continuing trespass, although if the thing does damage to the land after it ought to have been removed, an action for negligence or nuisance will lie (t). Nor is it continuing trespass if a man merely omits to restore land to the same condition (apart from removing anything which he has put on it) in which he found it: e.g., if he fails to fill up a pit which he has dug upon his neighbour’s land. He is, of course, liable in trespass for the original digging and for nuisance if any one falls into the pit, but for the mere omission to fill up the pit he is liable neither for trespass nor for any other tort (u).

§ 93. Defences to trespass.

Defences to
trespass.

Any interference with possession which is justifiable negatives what is *prima facie* a trespass. We can now consider the various justifications.

§ 94. (1) Licence.—For the purposes of trespass, the best definition of licence is that given by Sir Frederick Pollock. A licence is “that consent which, without passing any interest in the property to which it relates, merely prevents the acts for which consent is given from being wrongful” (a). It

(r) (1839), 10 A. & E. 503

(s) *Hudson v. Nicholson* (1839), 5 M. & W. 437; followed in *Konskier v. Goodman, Ltd.*, [1928] 1 K. B. 421.

(t) *Shapcott v. Mugford* (1696), 1 Ld. Raym. 187, 188; trespass *vi et armis* does not apply to non-lease. It is difficult to reconcile *Konskier’s Case* (last note) with this principle, for on the facts of that case there was no trespass to begin with and therefore none that could be regarded as continuing: nevertheless, the C. A. held that there was a continuing trespass; a sufficient ground for the decision would have been that the limited licence given to the defendants had ended.

(u) *Clegg v. Dearden* (1848), 12 Q. B. 576, 601.

(a) Torts, 300; *Ashby v. Tolhurst*, [1937] 2 K. B. 242. The word has wider meanings which do not concern us here.

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must be sharply distinguished from interests created in land, like leases, easements or profits *à prendre*, existing at law. These confer rights *in rem*, i.e., rights which avail against persons generally, and not merely against the lessor or grantor; whereas a licence gives only a right *in personam* against the licensor. A, by deed, grants to B the sole and exclusive right of using A's canal for letting out B's pleasure boats for hire. This is only a licence, and if C starts competing with B, B may be able to sue A for breach of contract, but he cannot sue C, for his right does not avail against him (b). So, too, if a football club gives B the sole right of selling programmes on the club ground, that will not entitle B to prevent C from selling them there also.

Of course the test of a licence that it confers only a right *in personam* does not tell us exactly what interests will be regarded as such rights *in personam*. Thus, if I have a right of way over your land in virtue of having adjacent land of my own, that is an easement, a right *in rem*, and not a mere licence, for I have a dominant tenement to which my right over your land is annexed. But if I have no such land, then my right may be a licence, but it cannot be an easement; for that would be an "easement in gross", the legal possibility of which is denied. But some ingenuity is needed to reconcile *Hurst v. Picture Theatres, Ltd.* (c), with this principle (see the case discussed below).

A licence can be revoked at any moment by notice to the licensee, provided that he be given a reasonable time to remove himself and his goods placed on the land in pursuance of the licence (d). If, however, the time (if any) specified for such removal is not reasonably sufficient, the revocation of the licence is still valid, although the licensor cannot successfully sue the licensee for trespass until a reasonable time has elapsed and the licensee has not then quitted the land. The practical application of this is that the licensee is not entitled to sit still and do nothing merely because the time specified for his

(b) *Hill v. Tupper* (1863), 2 H. & C. 121. See the criticism of this case in Salmond, *Torts*, § 60 (3). *Thompson v. Park*, [1944] K. B. 408.

(c) [1915] 1 K. B. 1.

(d) *Cornish v. Stubbs* (1870), L. R. 5 C. P. 334, 339—340; *Mellor v. Watkins* (1874), L. R. 9 Q. B. 400; *Canadian Pacific Ry. v. R.*, [1931] A. C. 414, 432; *Winter Garden Theatre, Ltd. v. Millenium Products, Ltd.*, [1948] A. C. 173.

evacuation of the land is unreasonably short; he must remove himself and his goods within what is a reasonable period in the circumstances of the particular case (e).

There are two qualifications of the rule that a licence is revocable at any moment:

(i) *Executed licence*.—If a licence has been executed, it cannot be revoked in the sense that the licensee can be compelled to undo what he has lawfully done. If I allow you to post bills on my hoarding, I can at any moment cancel my permission, but I cannot force you to remove bills that you have already stuck there. So, in *Liggins v. Inge* (f), where an oral licence had been given to lower a river bank and make a weir above the licensor's mill, it was held that he could not sue the licensee for continuing the weir which the latter had erected. But the rule that an executed licence is irrevocable applies only where the licence can be construed as authorising the doing of exactly what was done. It does not apply where there has been mere acquiescence in something which was never authorised before it was done. In *Canadian Pacific Ry. v. The King* (g), a railway company erected telegraph poles on land not belonging to them. This was in origin a trespass, but by dint of toleration on the part of the landowner over a period of time the presence of the poles was held to be by the landowner's licence. Nevertheless, this did not make the licence an executed one and the landowner could compel the company to remove the poles after reasonable notice to do so.

(ii) *Licence coupled with an interest (or grant)*.—This is irrevocable. Here "grant" is used as equivalent to "interest", and it must be noted that in this sense it does not signify "deed of grant", or instrument under seal. There is a genuine risk of confusing the two meanings because occasionally they occur in the same context.

What, then, is an "interest"? To this the reported cases give no precise answer, but perhaps we are not far from the mark if we say that it signifies a right *in rem* over property acquired in pursuance of the licence, as distinct from a right *in personam*; or (in terms more familiar to the English practitioner) that it is a licence which confers on the licensee a property right against persons generally (including the

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Licence
revocable
unless :

(i) executed,
or

(ii) coupled
with interest.

(e) *Minister of Health v. Bellotti*, [1944] K. B. 298.

(f) (1831), 7 Bing. 682; *Davies v. Marshall* (1861), 10 C. B. (N.S.) 697.

(g) [1931] A. C. 414. 428—429.

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licensor) instead of a mere right (based on contract or agreement) against the licensor himself. The licence itself—the bare permission to enter—is only a right *in personam*; but it may confer a right *in rem* to something when you have entered; if so, it is coupled with an interest. “A licence to hunt in a man’s park, and carry away the deer killed to his own use; to cut down a tree in a man’s ground, and to carry it away the next day after to his own use, are licences as to the acts of hunting and cutting down the tree, but as to the carrying away of the deer killed and tree cut down, they are grants. So, to licence a man to eat my meat, or to fire the wood in my chimney to warm him by, as to the actions of eating, firing my wood, and warming him, they are licences; but it is consequent necessarily to those actions that my property be destroyed in the meat eaten, and in the wood burnt” (*h*). Until the deer or tree is taken away, the licence is irrevocable (*i*). But *Frank Warr & Co., Ltd. v. L.C.C.* (*k*) exemplifies a licence without any such interest. The lessees of a theatre gave X by contract the exclusive right for a term of years to supply refreshments in the theatre and for that purpose to have the necessary use of the refreshment rooms and cellars of the theatre, and the exclusive right to advertise in certain parts of the theatre. This was not a licence coupled with an interest. The agreement to use the rooms could be carried into effect without giving legal possession of them and the agreement as to the advertisements imported no grant of the walls or any part of the premises (*l*).

Difficulties :
(a) *Wood v. Leadbitter*;

So far the law is passably clear. But the changing relations of Common Law and Equity in the nineteenth century produced a tangled skein in the twentieth. The starting-point was *Wood v. Leadbitter* (*m*) in 1845; the journey’s end (if indeed it was the end), *Hurst v. Picture Theatres, Ltd.*, in 1915 (*n*). We begin with the proposition that if a licence coupled with an interest required some particular form for the creation of the interest, *e.g.*, an instrument under seal, then it must be created in that way; thus an easement is usually

(*h*) Vaughan, C.J., in *Thomas v. Sorrell* (1672), Vaughan 330, 351.

(*i*) The Court in *Wood v. Leadbitter* (1845), 13 M. & W. 838, 844—845

(*k*) [1904] 1 K. B. 713. Cf. *Clare v. Theatrical Properties, Ltd.*, [1936] 3 A. E. R. 483.

(*l*) [1904] 1 K. B. 721—722. See, too, *Thompson v. Park*, [1911] K. B. 408.

(*m*) 13 M. & W. 838

(*n*) [1915] 1 K. B. 1 (W. Cases, 131).

created under seal. Conversely, if what the licensee gets is not an "interest", the fact that it is created under seal will not make it any the less revocable than if it were by parol. In *Wood v. Leadbitter*, the plaintiff had bought from the defendant a guinea ticket entitling him during all the days of a race meeting at Doncaster to go into an enclosure on the race-course and into the grand-stand in the enclosure. The defendant wrongfully ejected him. The plaintiff sued him, not upon the contract, but for assault. The defence was that the plaintiff had no right to remain there because, at most, he had only a bare licence. This defence was held to be good on either of two grounds: (1) there was no "interest" at all; or (2) even if there were an "interest" it was one which ought to have been created under seal. Such was the decision of a Common Law Court. But in Equity there is a doctrine that "Equity looks on that as done which ought to be done", and one application of this is that if an agreement to do a thing is specifically enforceable, Equity will treat it as done. Now, the Judicature Act, 1873 (o), provided that wherever Common Law and Equity conflict on the same matter the rule of Equity shall prevail (p).

This principle was applied by the Court of Appeal in *Hurst v. Picture Theatres, Ltd.* (pp), with results that have provoked great controversy. Hurst bought a ticket for an unreserved seat in the defendants' theatre. He took his seat, was wrongfully asked to go, refused to do so and was forcibly ejected. He sued for assault and recovered judgment for £150 damages. (He could, of course, have sued for breach of contract, but it is questionable whether he could have recovered so much (q)). A majority of the Court of Appeal affirmed this judgment. Buckley, L.J. (r), distinguished *Wood v. Leadbitter* on the grounds that there (1) the Court was wrong in holding (if, indeed, it did so hold) that the licence was not coupled with an interest, for Wood could not have seen what he had come to see without being in the enclosure; and (2) the Court was right in holding that such an interest required an instrument under seal, but that this requirement had been swept away by the Judicature Act. A storm of adverse criticism burst

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(b) *Hurst's Case*.

(o) 36 & 37 Vict. c. 66, s. 25 (11).

(p) *Walsh v. Lonsdale* (1882), 21 Ch. D. 9, is the stock example of the working of this section.

(pp) [1915] 1 K. B. 1 (W. Cases, 131).

(q) *Post*, p. 329.

(r) *At* pp. 5—11.

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upon *Hurst's Case* (s) and the main objections to the decision are two. First, it is asked how Equity could have specifically enforced the agreement before the Judicature Act? (t). Secondly, it is urged that *Hurst's Case* perpetrates the heresy of implying the possibility of an easement in gross, for Hurst clearly had no dominant tenement (u). It may be replied to this that the Court of Appeal did not regard themselves as sanctioning this—indeed, they rather evaded the point (v)—and that all they *decided* was that Hurst had sufficient interest in the premises to prevent the defendants from ejecting him. But the difficulty still remains: “What kind of right had Hurst?” It may have been possession (w); if so, it was apparently a licence coupled with an interest. It may have been mere use of the seat; if so, it was a right *in personam* and presumably a bare licence. In *Winter Garden Theatre, Ltd. v. Millenium Productions, Ltd.* (a), Viscount Simon regarded the decision in *Hurst's Case* as correct, and *Wood v. Leadbitter* as no longer an authority (b).

Result.

The result seems to be that *Wood v. Leadbitter* is, if not dead, cataleptic (c), and that a licence of this type is irrevocable provided value be given for it, for even Equity would not enforce a gratuitous agreement (d). Only the House

(s) It is neatly summarised in H. G. Hanbury, *Equity* (4th ed. 1946), 95—97. See, too, H. W. R. Wade in 64 L. Q. R. 57—76.

(t) Dr. Hanbury, *op. cit.*, 96, finds it ludicrous to suppose that a person ejected as Hurst was could “pick himself up from the pavement and forthwith obtain a decree of specific performance of his contract”. On the other hand, Sir Frederick Pollock suggested that a Judge who happened to be present at the incident might have granted an *ex parte* injunction: 31 Law Quarterly Review (1915), 9.

(u) Sir John Miles in 31 L. Q. R. 217—223. The learned author, however, admits that it is uncertain whether this was a heresy at all in the earlier nineteenth century. See, too, G. Cross, “Equitable Easements”, in Bell Yard, No. XV (May, 1935).

(v) E.g., Kennedy, L.J., [1915] 1 K. B., at p. 14.

(w) As Kennedy, L.J., seemed to think: *ibid.*

(a) [1948] A. C. 173, 191.

(b) Lord Porter took the same view, but he thought the point irrelevant to the case before the House (*ibid.*, 194). Lord Uthwatt considered it unnecessary to express an opinion on the point (*ibid.* 202), and Lords MacDermott and Simonds made no reference to either *Hurst's Case* or *Wood v. Leadbitter*.

(c) The American Restatement of Torts, Vol. 1, § 171 (b) appears to adopt it in preference to *Hurst's Case*; so, too, the High Court of Australia in *Cowell v. Rosehill Racecourse Co., Ltd.* (1937), 56 C. L. R. 605.

(d) Buckley, L.J., in *Hurst's Case*, [1915] 1 K. B. at p. 10. None of the other *dicta* or cases cited in the text-books is quite conclusive as to this: e.g., *Kerrison v. Smith*, [1897] 2 Q. B. 445; *British Actors Film Co. v. Glover*, [1918] 1 K. B. 299, 307; *Said v. Butt*, [1920] 3 K. B. 497, 499. Note that a licence is not irrevocable merely because value has been given

of Lords, or the Court of Appeal itself, can now explain the undoubted technical difficulties raised by *Hurst's Case*. As none of the criticism upon it is directed against the moral justice of the decision, it would be regrettable if it were not followed, but one would like to see it affirmed or followed on grounds more satisfying than those in the Court of Appeal. One would like to suggest that, where value has been given for entry on premises, the transaction might be treated as a contract and nothing else and that the idea of licence in this connexion might be thrown overboard. It would then be a question of construction of the contract in each case whether it authorised the holder of the ticket to retain his seat or place during the spectacle. But the objection to this is that the rules as to remoteness of consequence in the law of contract differ from those in the law of tort, and that while the assault and battery suffered by Hurst were the direct consequences of revocation of the licence, it is questionable whether they would not have been too remote if Hurst had founded his action entirely upon breach of contract.

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(2) Justification by law.—Trespass of all kinds, whether to land, goods or the person, is frequently justified by law. Private defence, necessity, parental authority and the like conditions which negative liability have already been treated earlier in this book. The numerous instances in which officers of the law are authorised to enter land, or to take goods, or to arrest or restrain a person belong as much to public as to private law, and the whole topic is too vast to give more than one illustration here. A policeman commits no trespass if he enters a public-house through an open door late at night in order to investigate a disturbance (e), but he is not entitled to enter private premises merely in order to put property there (e.g., a bicycle) in a safer place, and not upon any suspicion of a felony being committed in respect of it; for if such an action were held to be lawful, it would seriously curtail the sanctity and privacy of a dwelling-house (f). Nor is it only officers of the law who may be thus empowered. A private

(2) Justification by law.

for it; if it is not also coupled with an interest, it is just as revocable as if it were gratuitous.

(e) *R. v. Smith* (1833), 6 C. & P. 216; *Thomas v. Sawkins*, [1935] 2 K. B. 249.

(f) *Great Central Ry. v. Bates*, [1921] 3 K. B. 578, 581; *Davis v. Lisle*, [1936] 2 K. B. 434.

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person may in certain circumstances arrest a criminal, and it is no trespass if he breaks into the house of another person in order to prevent him from murdering his wife (*g*), or probably from committing any other felony (*h*). Another very common justification which can be pleaded and which has nothing to do with the enforcement of criminal law is distress for rent by a landlord, a subject of such importance that there are many monographs upon it (*i*). Much less usual is:

Distress
damage
feasant.

Distress damage feasant (k).—This is seizure by A, the possessor (*l*) of land of any animal or chattel belonging to B which is wrongfully on A's land and is doing damage to it. It is usually applied to beasts, but is not limited to them, for a railway engine has been distrained damage feasant (*m*). It may extend to nuisance as well as to trespass. It is a moot point whether the distrainer must prove damage and the question has been fully considered by Dr. Williams (*n*). Our own suggestion is that, where it is for trespass, there ought to be no need to prove damage: first, because trespass is actionable *per se*; secondly, because it is desirable in the application of self-help (of which distress is a species) that the law should be sharply defined; it might be difficult for the distrainer to be certain in some cases whether the trespass did or did not involve damage. Moreover, doubtful as the authorities are, we believe that the trend of them in modern times favours our suggestion (*o*). As to nuisance, it is submitted that in those cases in which damage must be proved (*post*, § 135) it must also be established for the application of distress damage

(*g*) *Handcock v. Baker* (1800), 2 Bos. & P. 260.

(*h*) *Ibid.*, 265; *per* Chambre, J. The American Restatement of Torts, Vol. 1, § 197, and "Second Caveat", sets up an odd distinction; while "private necessity" will warrant entry on the land of another to rescue the entrant or a third person from death, it is doubtful whether entry into another person's dwelling-house for that purpose is similarly excusable.

(*i*) *E.g.*, Daniels, Law of Distress.

(*k*) The history and present law of distress damage feasant are considered in Glanville Williams, Liability for Animals, Chap. I—VIII.

(*l*) *Burt v. Moore* (1793), 5 T. R. 329.

(*m*) *Ambergate Ry. v. Midland Ry.* (1853), 2 E. & B. 793.

(*n*) Liability for Animals, 70—76. Cf. Salmond, Torts, 196, note (*a*).

(*o*) In *Wormer v. Biggs* (1815), 2 C. & K. 31, the jury were directed that the horse there distrained must have been either doing actual damage or likely to do further damage; but this was only a ruling *at nisi prius*, and a stronger Court in *Ambergate Ry. v. Midland Ry.* (1853), 2 E. & B. 793, 23 L. J. Q. B. 17, seems to have regarded mere encumbrance as sufficient, although it must be admitted that no question was raised as to damage, nor was *Wormer v. Biggs* cited.

tenant. In any event, if there is damage, it is immaterial whether it was done to the freehold or to movables; thus, a pony was held to be rightly distrained for straying on the plaintiff's land and kicking his filly there (p).

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The taking is only a mode of compelling the offender to pay compensation for the damage done, and therefore directly such payment is made, the thing seized must be restored. Moreover, distress damage feasant suspends the right of action for damages. The injured party cannot have it both ways, and the remedies are alternative (q).

If there is no trespass, there is no right to distrain. Thus, if cattle, while they are being driven on the highway, stray on to adjoining land without any negligence on the part of the driver, they cannot be distrained until a reasonable opportunity has been given to the driver to get them off again, for until then they have committed no trespass (r).

The right to distrain, being an extra-judicial remedy, was always severely limited by the law. Hence, it must take place on the distrainer's land. If the thing escapes, he has no right to recapture it even on hot pursuit and even if the offending owner chased out or removed the thing for the express purpose of avoiding distress (s). If an animal distrained escapes, the distrainer loses even his action for trespass unless he can prove that the escape was due to no fault of his (t). Nor is seizure of property actually in use allowable, for "if it were permitted to a party to distrain a horse, while any person is riding him, it would perpetually lead to a breach of the peace" (u). Finally, the right is merely to detain. The Protection of Animals Act, 1911 (a), makes it a punishable offence not to supply with sufficient food and water an animal detained. The old law forbade the distrainer even to milk kine (b). This

(p) *Boden v. Roscoe*, [1894] 1 Q. B. 608. Clerk & Lindsell, Torts, 502, regard this as unsupported by earlier authority; at any rate, it is a sensible decision.

(q) *Boden v. Roscoe*, [1894] 1 Q. B. 608.

(r) *Tillett v. Ward* (1882), 10 Q. B. D. 17; *Goodwyn v. Cheveley* (1859), 4 H. & N. 681. For the reason for this rule, see *post*, § 150 (3).

(s) Co. Litt. 161 a; Holt, C.J., in *Vaspor v. Edwards* (1701), 12 Mod. 658, 661; *Clement v. Milner* (1800), 3 Esp. 95; Williams, *op. cit.*, 59—61.

(t) *Vaspor v. Edwards* (1701), 12 Mod. 658; *Lehain v. Philpott* (1875), L. R. 10 Ex. 242, 245.

(u) *Storey v. Robinson* (1795), 6 T. R. 138, 139; *Field v. Adames* (1840), 12 Ad. & E. 649.

(a) 1 & 2 Geo. 5, c. 27, s. 7.

(b) Powis, J., in *Vaspor v. Edwards* (1701), 12 Mod. 658, 662.

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rule can scarcely be law now without qualification, for it might lead to very brutal results.

There is nothing to prevent a person from ejecting trespassing animals or chattels from his land in preference to distraining them (c), but presumably he is bound to do so with reasonable consideration for the safety of the animal and of other people, such as users of the highway.

Trespass
ab initio.§ 95. Trespass *ab initio*.

Where trespasses are justified or excused by the law, as distinct from any permission given by the person injured, a doctrine inherited from the technicalities of the older law is applicable—trespass *ab initio*. It covers all kinds of trespass whether to land, to goods or to the person, and it may be thus stated. If one who is entitled by law to do an act abuses his authority to do it, he is said to be a trespasser *ab initio*; his act is reckoned as unlawful from the very beginning, however innocent his conduct may have been up to the moment of the abuse. Thus, the law allows any one to enter an inn for refreshment, or to distrain goods damage feasant, or (if he be a constable) to search a person suspected of having stolen goods; but if the guest steals property in the inn, or if the distrainer kills the beast which he has seized damage feasant, or if the constable uses unnecessary violence in his search, the act is as if it had never been authorised (d). But the abuse must be a positive act and not a mere omission. This was the point in the *Six Carpenters' Case* (1610) (e), the leading authority on the topic. Six carpenters entered an inn, called for bread and a quart of wine, consumed both and then refused to pay the reckoning of eightpence. This was held not to be trespass *ab initio* "because not doing is no trespass" (f).

Why, it may be asked, was the doctrine of trespass *ab initio* limited to licences given by law and not extended to those accorded by the party himself? Because, according to Coke, the law adjudges by the subsequent act with what intent the licensee entered for "*acta exteriora indicant interiora*

(c) *Mitten v. Faudrye* (1624), Pop. 161; *Tyrringham's Case* (1584), 4 Rep. 4 b, 38 b; Williams, *op. cit.* 20.

(d) The older cases are epitomised in Viner's *Abridgment*, Vol. XX (2nd ed. 1793), 499—504.

(e) 8 Rep. 146 a (W. Cases), 135.

(f) 8 Rep. 146 b.

secreta” (g). If any man lesser than Coke had given this as a reason, it would have been described as nonsense. A much better one is that the Common Law has always been careful to provide remedies against abuses of authority which may lead to the oppression of the subject. Now the idea of trespass *ab initio* originated in the law of distress because officials like sheriffs and bailiffs were, and indeed still are, the people who usually distrain, and it was important that any abuse of their powers should be sternly checked; and it was an easy step to extend this to abuses of other kinds of authority given by the law (h).

It may also be asked why trespass *ab initio* was limited to acts and did not extend to mere omissions. No better reason can be supplied for this than that in medieval times a man who did nothing was rarely held liable, for then the law was less respected than it is now and was sufficiently pre-occupied with preventing the doing of evil acts rather than in punishing people for inaction except where it took the form of evasion of public duties. And so it was said of trespass *ab initio*, “*nihil factum ne serra dit torcious*” (i). It may be that this reason has lost its force in modern times, but the rule still prevails both here and in America (k).

If an entry on land is authorised by law for a particular purpose, such as the arrest of a person or the seizure of his property, and property is seized outside the scope of the entrant’s authority, there is no trespass *ab initio* with respect to entry on the land, although there is with respect to the property wrongfully seized (l). If the law were otherwise, it would make the position of officials like policemen and sheriffs even more difficult than it is at present, for very little latitude is accorded to them when they make mistakes.

(g) *Ibid.*

(h) Bacon, Abr. (7th ed. 1832), Vol. 7, 650; Trespass (B) *sub fin.*; Holdsworth, History of English Law, vii, 500.

(i) Catesby *arguendo* in Y. B. Pasch. 12 Edw. IV, pl. 22, f. 8. See, too, Holdsworth, H. E. L., vii, 500—501, where it is pointed out that a similar rule with respect to conversion ceased to be law in the later seventeenth century.

(k) Restatement of the Law of Torts (1934), Vol. 1, § 214.

(l) *Elias v. Pasmore*, [1934] 2 K. B. 164; *Canadian Pacific Wine Co., Ltd. v. Tuley*, [1921] 2 A. C. 417; *Harvey v. Pockock* (1843), 11 M. & W. 740.

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§ 96. Remedies for trespass.

Remedies.

The action for trespass, besides being used to remedy trespass as a pure tort, has also some varieties which are employed for the recovery of land and the profits thereof, and of these we shall speak in the next sections on ejectment and mesne profits. The remedies for trespass as a pure tort need no special mention except the *right of re-entry*. The person entitled to possession can enter or re-enter the premises, but the Statutes of Forcible Entry beginning with one of A.D. 1381 (*m*) require him to do so in a peaceable manner, otherwise he commits a crime punishable by imprisonment. But, whatever his criminal liability may be, he is not civilly liable if he uses no more force than is necessary. Until 1920 a considerable number of cases on this point had resulted in nothing but a crop of doubts and some hair-splitting distinctions, but in that year *Hemmings v. Stoke Poges Golf Club* (*n*) set the law at rest. The plaintiff, tenant of a cottage owned by the defendants, refused to quit it after notice had been duly given to him. The defendants thereupon entered the cottage and removed the plaintiff and his furniture with no more force than was necessary. He sued them for assault, battery and trespass, and they were held not liable.

Re-entry.

The measure of damages in trespass is subject to some peculiarities which need not be examined in a students' book (*o*).

Ejectment

§ 97. Action for the recovery of land (Ejectment).

By the action of ejectment, or, as it should now be called, the action for the recovery of land, a person dispossessed of land can recover it specifically. The story of this remedy is an old one and neatly exemplifies the use of fictions in the development of a legal system. It was originally a species of the action for trespass to land, and was invented for the benefit of the leaseholder, to whom the remedies of the freeholder were denied because he had mere "possession" of the land and not that blessed and superior "seisin" which gave the freeholder very adequate, if excessively dilatory, protection in the shape of the real actions. Then, by a notable paradox, the action of ejectment was seen to be so quick and efficient

(*m*) 5 Ric. 2, st. 1, c. 7 See also 15 Ric. 2, c. 2, and 8 Hen. 6, c. 9.

(*n*) [1920] 1 K. B. 720, where the earlier authorities are considered.

(*o*) They are set out in Salmond, *Torts*, § 50.

compared to the ponderous progress of the real actions that the freeholder adopted it by a series of fictions. If, for example, Smith, a freeholder, were seeking to recover the land from Brown, he was allowed to pretend that he had leased the land to John Doe, an imaginary person, and that John Doe had been ejected by another non-existent person, Richard Roe (the "casual ejector"). Then Smith began his action with Doe as the nominal plaintiff against Roe as the nominal defendant, but he first served on Brown a notice signed by "your loving friend, Roe", in which Roe informed Brown that Roe claimed no interest in the land and advised Brown to defend the action. The fictitious parties then disappeared and the stage was cleared for the proceedings between Smith and Brown. The title of the action was "John Doe on the demise [*i.e.*, lease] of Smith *v.* Brown", or, more briefly, "Doe *d.* Smith *v.* Brown". It was useless for Brown to protest against these fictions; he was not allowed to defend the action unless he acquiesced in them (*p*). The remarkable result was that the question of ownership of land was fought under the guise of an action of trespass.

These fictions have been long abolished (*q*), and an action for the recovery of land (as it is now called, though it is still occasionally referred to as an action of ejectment) differs in no formal respect from any other action. But possession is still an important feature in it, for the plaintiff cannot sue unless he is out of possession and it is the right to immediate possession which he seeks to vindicate (*r*).

A rule that has been repeatedly asserted is that in an action of ejectment the plaintiff must recover by the strength of his own title and not by the weakness of the defendant's (*s*), and since the action for the recovery of land has taken the place of ejectment the rule has been recognised by both the House of Lords (*t*) and the Judicial Committee of the Privy Council (*u*), and is implied in the Rules of the Supreme

(*p*) Sometimes the fictitious names were more descriptive: *e.g.*, *Fairclaim v. Sham-title* (1762), 3 Burr. 1290.

(*q*) For the history of the matter, see Holdsworth, *History of English Law*, in, 213—217; vii, 4—23. The best account is in Maitland, *Equity* (ed. 1916), 352—355; reprinted separately as *Forms of Action* (1936), 56—59.

(*r*) Bullen & Leake, *Precedents of Pleadings* (9th ed. 1935), 45—46.

(*s*) Lee, C.J., in *Martin d. Tregonwell v. Strachan* (1742), 5 T. R. 107, note, is said to have first formulated the rule: S. A. Wiren in 41 *Law Quarterly Review* (1925), 145.

(*t*) *Danford v. McAnulty* (1883), 8 App. Cas. 456, 460, 462, 464.

(*u*) *Emmerson v. Maddison*, [1906] A. C. 569, 575.

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Court (a) which make it unnecessary for the defendant either by himself or his tenant to plead his title (unless he is relying upon some equitable right); he need only allege that he is in possession, and the plaintiff must, if he can do so, positively prove that his own title is better. But when we ask what exactly he must prove in order to establish his title, the law does not appear to require much. It has been said, indeed, that he must do more than set up the mere *de facto* possession which, as we have seen, will usually enable him to sue for trespass as a tort (b), but this distinction between the action of ejectment and the action for pure trespass is a tenuous one in view of other authorities, the most important of which is *Asher v. Whitlock* (c), where it was held that, if A takes possession of waste land without any other title than such seizure, he can maintain ejectment against B who subsequently enters on the land and who cannot show title or possession in any one prior to A (d). When, therefore, it is said that A's former possession raises only a presumption of title it must be confessed that this presumption is not easily upset (e).

Jus tertii.

Jus tertii.—It has already been noted that the defendant to an ordinary action of trespass cannot as a general rule set up the defence of *jus tertii* (f). Is this rule applicable to the defendant to an action of ejectment? As the plaintiff there must prove his title, it would seem to be a corollary that if the evidence, whether it appear from the plaintiff's own case or be produced by the defendant, shows that some third person is entitled to the land, the plaintiff ought not to succeed; in other words, the defendant ought to be allowed to plead *jus tertii*. But whether this is the law has been greatly debated by various writers (g). If, however, we limit ourselves to what has been actually decided by the Courts, it appears that *jus tertii* is a defence. *Doe d. Carter v. Barnard* (h) is the leading authority to that effect. True, this decision received a

(a) Ord. 21, r. 21.

(b) *Harper v. Charlesworth* (1825), 4 B. & C. 574, 589, 592—594.

(c) (1865), L. R. 1 Q. B. 1. See, too, *Doe d. Hughes v. Dyeball* (1829), Moo. & M. 346.

(d) Approved by the Judicial Committee in *Perry v. Clissold*, [1907] A. C. 73, 79.

(e) *Whale v. Hitchcock* (1876), 34 L. T. 136.

(f) *Ante*, p. 308.

(g) For full discussion of the question, see 41 L. Q. R. (1925), 139—169 (S. A. Wren), and 56 L. Q. R. (1940), 376—298 (A. D. Hargreaves), 479—482 (Sir William Holdsworth).

(h) (1849), 13 Q. B. 945.

glancing blow from Cockburn, L.C.J., in *Asher v. Whitlock* (i) and a much harder knock from Lord Macnaghten in *Perry v. Clissold* (k) but the *dicta* of these learned Judges were *obiter*, for in neither of these cases was *jus tertii* raised, nor indeed could it have been raised on the facts. Both cases decide no more than that if the plaintiff in ejectment once had *de facto* possession of the land, that raises a presumption of title in his favour which mere subsequent possession of the defendant will not defeat. Neither of them decides that the plaintiff's claim cannot be upset by proof of *jus tertii*; indeed, *Asher v. Whitlock* implies that it can be.

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Moreover, the principle which is supported by *jus tertii*—that the plaintiff must win by his own strength and not by his opponent's weakness—is a sound one. What he is seeking to establish is ownership of the land and, if it appears to be in any one else, why should the defendant be compelled to give up possession to *him*? Against this it has been urged that if the plaintiff can win (as undoubtedly he can) if he once had *de facto* possession and the defendant can show nothing but a later *de facto* possession on his own part, then the plaintiff ought to win in any event because the law greatly respects possession. But that is a two-edged argument, for if the law respects possession which the plaintiff once had, why should it not equally respect possession which the defendant now has? And it sounds odd to insist that, because C is the real owner of land, B, who is in wrongful (but legally protected) possession of it, ought to give it up to A who once had wrongful possession of it.

Probably
a defence.

Assuming that *jus tertii* is a defence, there is one exception to its applicability. If B has acquired possession of land from A, B cannot in an action of ejectment sued against him by A, or by any person claiming through A, plead that A's title was defective: *i.e.*, he cannot set up *jus tertii*. The commonest illustration of this is the rule that a lessee cannot dispute the title of his lessor. This is an instance of estoppel, a rule of evidence based upon the principle that "a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth" (l). If A lets land to B, B cannot impugn A's title in any action brought against him by A, or by any one

Exception.

(i) (1865), L. R. 1 Q. B. 1, 6.

(k) [1906] A. C. 73, 79—80.

(l) Co. Litt. 352a.

§§ 97, 98. claiming through A; for it would be unreasonable to allow him to dispute the title of a man from whom he had the use and enjoyment of the land. He cannot have it both ways. If he wishes to pick holes in his landlord's title, he must either (i) give up the lands to him; or (ii) show that the landlord has, since the lease began, lost his interest in the lands or has alienated it to some one else (*m*); and if B is a mere licensee of A, and not his lessee, he is *a fortiori* in no better position (*n*). This estoppel is not limited to the relationship of lessor and lessee. It extends to any one who is sued in ejectment by one from whom he derived his interest. "If a person obtains possession of land, claiming under a will or deed, he cannot afterwards set up another title to the land against the will or deed, though the deed or will did not operate to pass the land in question" (*o*).

Mesne
profits.

§ 98. Action for mesne profits.

The action for mesne profits is another species of the action for trespass and lies to recoup the plaintiff for the damages which he has suffered through having been out of possession of the land. It was all the more necessary because by Blackstone's time nothing but a shilling or some such trivial sum was usually recoverable in the action of ejectment because it had been "licked into the form of a real action" (*p*) and its chief purpose had become the trial of the title to land (*q*). If the claimant were successful, he got possession of the land but no compensation for having been kept out of it. "Mesne profits" refer to the profits taken by the defendant during his occupancy, but the action for mesne profits was not limited to the amount of the rental value of the land, but included also damages for deterioration and the reasonable costs of getting possession (*r*).

(*m*) Everest & Strode, Estoppel (3rd ed. 1923), Chap. VIII; Williams & Yates, Ejectment (2nd ed. 1911), Chap. V.

(*n*) *Doe d. Johnson v. Baytop* (1835), 3 Ad. & E. 188.

(*o*) Lopes, L.J., in *Dalton v. Fitzgerald*, [1897] 2 Ch. 86, 93.

Another exception to the permissibility of pleading *jus tertii* is suggested with some doubt in Salmond, Torts, § 51 (3). "If the defendant's possession is wrongful as against the plaintiff, the plaintiff may succeed though he cannot himself show a good title." But, assuming that this is law, has it any necessary connexion with *jus tertii*?

(*p*) Wilmut, C.J., in *Goodtitle v. Tombs* (1770), 3 Wils. K. B. 118, 120.

(*q*) Blackstone, Comm. iii, 205.

(*r*) "I have known four times the value of the mesne profits given by a jury in this sort of action of trespass": Gould, J., in *Goodtitle v. Tombs* (1770), 3 Wils. K. B. 118, 121. And see *Doe v. Filliter* (1844), 13 M. & W. 47, 51-52.

The Rules of the Supreme Court (s) enable a plaintiff in an action for the recovery of land to join with it a claim for mesne profits; nor, in that case, is it necessary for the plaintiff to have entered the land before he sues. If he likes to do so, he can still bring the action for mesne profits separately instead of joining it with one for recovery of the land, but in that event he must first enter. For the action is one of trespass; trespass is a wrong to possession, and until he enters he has not got it. Note that merely to *continue* in possession of land is not trespass: *e.g.*, where a lessee holds over after his lease has expired; and distinguish from this the mere occupancy of a licensee which does not amount to possession, so that a licensee who holds over after his licence has ended becomes a trespasser. When once the plaintiff in the action for mesne profits has entered, then, by the fiction of trespass by relation (t), he is deemed to have been in possession during the whole period for which he claims the mesne profits (u). It was laid down in an old case that if entry be impossible because the plaintiff's title has ended (*e.g.*, by death of the *cestui que vie* before the tenant *pur autre vie* had an opportunity of entering on the person wrongfully holding the land) entry is not necessary in order to secure possession by this relation back of one's title (a); and this seems to have been accepted as law (b).

(s) Ord. 18, r. 2.

(t) *Ante*, p. 314.

(u) *Dunlop v. Macedo* (1891), 8 T. L. R. 43, contains a brief historical account of this.

(a) Y. B. 19 Hen. VI, fol. 28.

(b) *E.g.*, 2 Rolle Abr., 530 (K.); 15 Vin. Abr. (2nd ed.), 394, and cases there cited.

CHAPTER XIII

TRESPASS TO GOODS

§ 99. § 99. Trespass to goods is a wrongful interference with the possession of them.

Definition.

It may take innumerable forms, such as scratching the panel of a coach (*a*), removing a tyre from a car (*b*), injuring or destroying goods, or, in the case of animals, beating (*c*) or killing (*d*) them, or infecting them with disease (*e*). All that is necessary is that the harm done should be direct and not consequential (at any rate, as the law understands those terms) for otherwise the action, if any, must be case, not trespass. But physical contact is probably unnecessary; for chasing cattle has been a trespass time out of mind (*f*) and there is no reason to think that such chasing signifies actual beating or that a man is any the less liable for trespass to his neighbour's horse by scaring it off his neighbour's land than by putting a halter on it and leading it off; or for trespass to his neighbour's dog by putting poison where it can and does take it than by thrusting the substance down its throat (*g*).

Whether the damage done must be substantial (*i.e.*, whether the tort is actionable *per se*) is a matter of some doubt. According to an old case special damage must be proved where an animal is beaten (*h*), but no reason was given for the decision (*i*), and there must be many instances where,

(a) *Alderson B.*, in *Fouldes v. Willoughby* (1841), 8 M. & W. 538, 549.

(b) *G. W. K., Ltd. v. Dunlop Rubber Co., Ltd.* (1926), 42 T. L. R. 376, 593.

(c) *Slater v. Swann* (1730), 2 Stra. 872.

(d) *Sheldrick v. Abery* (1793), 1 Esp. 55.

(e) *Anderson v. Buckton* (1719), 1 Stra. 192, carries the point, although Lord Tenterden, C.J., disapproved of the case on another ground in *Daubney v. Cooper* (1830), 10 B. & C. 830. Cf. *Theyer v. Purnell*, [1918] 2 K. B. 333, 341.

(f) *E.g.*, *Farmer v. Hunt* (1610), 1 Brownl. 220; *Durant v. Childe* (1611), *ibid.*, 221.

(g) Salmond, *Torts*, § 83 (2), and Addison, *Torts* (8th ed. 1906), 579—580, are to the like effect. The American *Corpus Juris*, vol. 63 (1933), 892, seems to cite at least one authority in favour of this view; and the American Restatement of Torts, vol. 1, § 217, Comment (b), regards scaring of animals to their injury as sufficient.

(h) *Slater v. Swann* (1730), 2 Stra. 872.

(i) It appears to be the only authority for Street's view in *Foundations of Liability* (1906), i, 16.

if mere touching of objects like wet paint, waxworks or exhibits in a picture gallery or museum, be not trespass, then their possessor would be without a remedy. Such modern judicial opinion as there is favours Sir Frederick Pollock's view that it is trespass (*k*). §§ 99—101.

§ 100. Under the older law a trespasser to the person, land, or goods of another was liable whether his act were intentional or negligent. That is still the law (apart from inevitable accident) except as regards accidental harm committed on or from the highway, for in that event if the defendant were not negligent he is liable neither for negligence nor trespass (*ante*, § 63). With respect to trespass to goods in particular, the reports down to the early nineteenth century illustrate the general rule, but in very meagre fashion. One who negligently killed another's pigeons (*l*), or caused his ship to collide with another vessel (*m*), or who ignorantly took another's goods (*n*) was just as liable in trespass as if he had done these acts intentionally. Then follows an apparently complete blank in the reports as to inadvertent trespass to goods, probably because the injured party preferred the action for the nascent tort of negligence for reasons which have been already detailed (*o*), and now that this tort is fully established he seems to have forgotten such advantages as the action for trespass still possesses. But it is there if he wishes to make use of it.

Absence of intent or negligence generally no excuse.

§ 101. As trespass is an interference with possession, it follows that if the plaintiff were not in possession at the date of the alleged meddling, he cannot sue for trespass. He may be able to sue for conversion but, as will be noticed more fully when we deal with that tort, it is not coincident with trespass. "The distinction between the actions of trespass and trover is well settled: the former is founded on possession; the latter on property" (*p*).

Possession essential.

(*k*) Lord Blanesburgh in *Leitch & Co., Ltd. v. Leydon*, [1931] A. C. 90, 106. So, too, Salmond, *Torts*, § 83 (4). The American Restatement of *Torts*, vol. 1, § 218, is the other way; there is no liability unless either the chattel is impaired as to its condition, quality or value; or the possessor is deprived of its use for a substantial time. But a generous interpretation is put upon "impairment"; it would probably include blowing your nose on another man's handkerchief without his leave (*ibid.*, p. 560).

(*l*) Br. Abr. *Trespass*, 63 (A.D. 1373). See, too, 74, 99.

(*m*) *Covell v. Laming* (1808), 1 Camp. 497.

(*n*) *Colwill v. Reeves* (1811), 2 Camp. 575.

(*o*) *Ante*, § 63. See, too, 49 *Law Quarterly Review* (1933), 362—363, 376—377.

(*p*) Lord Kenyon, C.J., in *Ward v. Macauley* (1791), 4 T. R. 489, 490.

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Alleged
exceptions.

It is said that there are exceptions to this rule and that the following persons can sue for trespass although they had not possession:—(i) A trustee against any third person who commits a trespass to trust chattels in the hands of the beneficiary. . (ii) An executor or administrator for trespasses committed to goods of the deceased after his death but before probate is granted to the executor or before the administrator takes out letters of administration. (iii) The owner of a franchise (*e.g.*, a right to take wreck or treasure trove) against any one who seizes the goods before he himself can take them (*q*). But it is questionable whether any of these exceptions is genuine. The language used in the authorities relating to the trustee is none too clear, but it indicates that the trustee has possession of chattels in the hands of the beneficiary, and not merely the right to possess them (*r*). It does not follow from this that the beneficiary himself cannot sue, for if he holds the chattels he seems to have joint possession with the trustee (*s*). Again, the executor and administrator have long been regarded as having the deceased's possession continued in them; when they assume office their title relates back to his death. They have not merely the right to possess: they are in possession (*t*). Similarly, in the case of the franchise, possession is deemed to be with the owner of the franchise. In *Bailiffs of Dunwich v. Sterry* (*u*), the plaintiffs had the right to wrecks at Dunwich and the defendant took a cask of whisky from a wreck before the plaintiffs could get it. The defendant was held liable for trespass for "the right to the possession draws after it a constructive possession, which is sufficient to support the action" (*a*).

(*q*) Salmond, Torts, § 83 (6).

(*r*) *White v. Morris* (1852), 11 C. B. 1015; *Barker v. Furlong*, [1891] 2 Ch. 172, a case of conversion, but Romer, J., approved *White v. Morris*.

(*s*) Lewin, *Trusts* (14th ed. 1939), 642.

(*t*) *Tharpe v. Stallwood* (1843), 5 M. & G. 760, 770; Pollock & Wright, *Possession*, 146–147.

(*u*) (1831), 1 B. & Ad. 831.

(*a*) *Ibid.*, 842; Pollock & Wright, *op. cit.*, 147.

CHAPTER XIV

CONVERSION AND OTHER INJURIES TO GOODS

§ 102. It is impossible to give an intelligible account of conversion without a historical sketch of the action of *trover* which was the remedy for it; nor is *trover* completely understandable without some knowledge of the other actions for injuries to, or interference with, chattels. These remedies were, and indeed still are:—(1) *Detinue*. (2) *Replevin*. (3) *Trespass*, besides (4) *Trover*. We proceed to consider them separately.

(1) *Detinue*.—If A unjustly detains B's goods, B's remedy is *detinue*. The action is one of the oldest in our law, for it is traceable to the twelfth century (a). The defendant has the option of giving up the goods or paying damages. He is allowed this alternative partly because mediæval movables were often so perishable that the Court could not undertake the responsibility of enforcing their restoration, partly because the law then regarded all things as having a legal price, and if the plaintiff got that, he got all that he ought to have (b). The great drawback to *detinue* was that the defendant could defeat the plaintiff's claim by waging his law, i.e., by getting a number of compurgators to swear that they believed him to be oath-worthy although they knew nothing of the facts of the case. Nor was *detinue* of any use if the goods had been damaged by a bailee who nevertheless restored them to the bailor (or to his nominee); for the bailee was no longer detaining anything, and the bailor's only remedy was an action of trespass upon the case (c). These disadvantages led to the almost complete supersession of *detinue* by *trover* by devices which are discussed below.

(2) *Replevin*.—If A unlawfully takes B's goods by way of distress or otherwise, B's remedy is *replevin*. This action is

(a) Maitland, *Forms of Action* (1936), 48.

(b) *Ibid.*, 61–63.

(c) This may be inferred from Choke's argument in *Y. B. Hil. 39 Hen. VI*, f. 44, pl. 7. Later authorities are cited in Ames ("39 Hen. VI" is a slip for "39 Hen. VI") in *Select Essays in Anglo-American Legal History*, III, 441, and Holdsworth, *Hist. of English Law*, III, 350–351.

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also one of venerable origin and was very important in the Middle Ages, but by its very nature it was incapable of much expansion, and by 1770 the wider scope of trover had led to its use as an alternative—and something more—to replevin (*d*).

Trespass.

(3) *Trespass*.—The action of trespass to goods was considered in Chapter XIII, and the point to emphasise is that it has always been a wrong to possession, and does not necessarily involve any assertion of a right to deal with the goods or any appropriation of them. If there were a taking of them, then the remedy was trespass *de bonis asportatis* and possibly trover might lie; if there were injury, but no taking, trespass would still lie, but not trover unless the possessor's title were called in question (*e*).

Trover and conversion.

(4) *Trover and Conversion* (*f*).—The essence of conversion, the wrong for which trover was the remedy, is calling in question the title of another person to goods. It is dealing with them in such a way as to deprive the person entitled to them of their use and benefit, or it may consist in an absolute denial of his right to deal with them even though there be no physical interference with the possession of them.

Trover came into our law later than the other remedies just mentioned. Some such remedy was urgently needed. Detinue did not apply at all to *taking* goods but was limited to *keeping* them and moreover it could be stultified by the licensed perjury known as wager of law. Replevin was almost confined to wrongful distress. Trespass was a wrong to possession, not to the right to possess.

The history of trover has been well told and at length by several experts (*g*) and we need do no more than give a bare outline of it here. It began as an action of trespass upon the

(*d*) Maitland, *op. cit.*, 61; Holdsworth, *op. cit.*, iii, 285–287.

(*e*) Many modern cases show this. *Br. Abr. Trespass*, 63 (A.D. 1373) will serve as an early illustration.

(*f*) The chief literature on the history of the topic is in Holdsworth, *op. cit.*, iii, 350–351, 285–287, 450, 581–584; vii, 403–513; viii, 466–468; ix, 42; Pollock & Wright, *Possession*, Index “Conversion”, “Trover”; Ames, *History of Trover*, *Essays in Anglo-American Legal History*, iii, 417–445; *Disseisin of Chattels*, *ibid.*, 549–590; Street, *Foundations of Legal Liability*, i, 231, 262; Salmond, *Trover and Conversion*, 21 *L. Q. R.* (1905), 43–54; Bordwell, *Property in Chattels*, 29 *Harvard Law Review* (1915–1916), 374–394, 501–520; G. L. Clark, *Test of Conversion*, 21 *Harvard Law Review* (1907–1908), 408–415; Williams' *Saunders*, 47 (note to *Wilbraham v. Snow*); Salmond, *Torts*, § 71; Edward H. Warren, *Trover and Conversion* (1936, Cambridge, Mass.).

(*g*) See last note.

case in which it was alleged that the defendant had converted the plaintiff's goods to his use. The first instance of such an allegation was in 1479 (*h*). Then by 1547 a series of fictions had considerably expanded the action. It was alleged (i) that the plaintiff was possessed of the goods; (ii) that he accidentally lost them; (iii) that the defendant found them; (iv) that the defendant converted them to his own use (*i*). The losing and finding might be pure fictions, but the defendant was not allowed to deny them. And so this action of trover became the remedy for a new tort—conversion.

Nineteenth century legislation swept away these fictions and the action of trover has become the action for conversion. One of its remarkable developments historically was that conversion included not only appropriation to one's own use, but also disposition of the goods to another person and indeed any dealing with them in a manner adverse to the plaintiff and inconsistent with his right of dominion (*k*). Still more notable was the way in which it encroached upon the spheres of detinue, trespass and replevin. The difficulty in extending it to cases covered by detinue was this. Conversion could be committed only by a positive act—misfeasance. Now detinue lay where a man was in possession of goods and refused to give them up. Could it be said that such a mere refusal was a positive act? The line between misfeasance and non-feasance is apt to be a fine one, and the Courts, after some hesitation, took advantage of this and held mere refusal to re-deliver to be conversion unless, of course, it were justified (*l*). Detinue wilted considerably under this treatment and it was not until the abolition of the unpopular wager of law in 1833 and other procedural reforms in the early nineteenth century that it revived somewhat.

As to the action of trespass, there was a certain amount of give and take between it and trover, and at one time it looked as if any "asportation" (or moving) of property might be regarded not only as trespass to it but also as conversion of it. But this mischievously wide doctrine which would have made a scratch upon the panel of a coach a conversion of the

(*h*) Y. B. Hil. 18 Edw. IV, f. 23, pl. 5.

(*i*) Rastall, Entries (1596), 4b—5a.

(*k*) Pollock, Torts, 286.

(*l*) Holdsworth. *op. cit.*, vii, 405—415.

§§ 102, 103. whole vehicle (*m*) is certainly not law now, if it ever was (*n*). As to replevin, it has long been settled that trover is an alternative to it. This was undoubtedly stretching a point, for wrongful distraint of goods is not a denial of the owner's title to them, since the goods are reckoned to be in the custody of the law (*o*).

We can now state the present law as to these various remedies.

§ 103. Detinue.

Present law.
(1) Detinue.

As has been stated, this is the wrongful retention of the possession of a chattel. A good deal of the modern litigation with respect to it concerns the recovery of title deeds to land (*p*), but it is by no means confined to that. It does not matter how possession of the chattel was acquired; it may have been by a bailment and then the bailee is liable in detinue if he holds over after the bailment is determined, or it may be by finding and then the finder is liable if he wrongfully refuses to give up the chattel to the owner, or it may be any other mode of acquisition.

What must
be proved.

The plaintiff must prove, first, that he is entitled to possession of the chattel and, secondly, that the defendant detained it after demand had been made for its restoration (*q*). It is no defence that the defendant has not got possession if he once had it and improperly parted with it: *e.g.*, where an auctioneer mistakenly delivers an article to X which he has in fact sold to Y (*r*); so, too, if the defendant carelessly lost it; but accidental loss excuses him (*s*).

A good defence is that the refusal to deliver was not an unqualified one but was subject to a reasonable condition that the plaintiff's claim should be verified. This is especially so with respect to property that has been lost or stolen and has come into the hands of an innocent defendant. He is not liable in detinue, or indeed in any action, merely because he meets the plaintiff's demand by saying that he must make

(*m*) Alderson, B., in *Fouldes v. Willoughby* (1841), 8 M. & W. 540, 549.

(*n*) Holdsworth, *op. cit.*, vii, 414—421.

(*o*) *Ibid.*, iii, 286, note 8; vii, 415—416.

(*p*) See the cases in Roscoe, *Evidence in Civil Actions* (20th ed. 1934), ii, 1007—1008.

(*q*) *Gledstane v. Hewitt* (1831), 1 Cr. & J. 565, 570.

(*r*) *Jones v. Dowle* (1841), 9 M. & W. 19.

(*s*) *Reeve v. Palmer* (1858), 5 C. B. (N.S.) 84; *Roux v. Wiseman* (1857), 1 F. & F. 45.

inquiries which any reasonable man would make; indeed, he would be taking foolish risks if he did otherwise (t). § 103.

Jus tertii is generally no defence to a bailee who is sued in detinue by his bailor, for a bailee is estopped from disputing his bailor's title. To this there are two exceptions: first, if he has been evicted by title paramount, *i.e.*, if the article bailed to him has been taken from him by the true owner (u); secondly, if he is defending the action on behalf and by the authority of the true owner (a). There is no direct decision that *jus tertii* is a good defence where the defendant is in possession of goods otherwise than by bailment, *e.g.*, by finding, but as the burden of proving his title is on the plaintiff, it is conceived that it would be a good defence; that is the rule in conversion and the argument is equally strong where the defendant merely detains the goods.

If the plaintiff is successful in detinue, the judgment is that he recover either the goods or their value and in any event damages for their detention (b); but as the gist of the grievance is mere unlawful detention, the damages will be nominal unless the plaintiff prove that he has suffered special damages (c); thus, where railway scrip was detained and its market price rose between the demand for its return and the order for its restitution, the increase in value was taken into account (d). Whatever may be the reason for the defendant's refusal to return the goods, their value must be assessed as at the date of the verdict or judgment in favour of the plaintiff, and not as at the date of the defendant's refusal (e). This rule also applies to damages for conversion, but if the plaintiff knew or ought to have known at an earlier date of the defendant's actual or threatened conversion or detinue, and took no steps then to recover the goods or to sue for conversion or detinue of them, the damages will be the value of the goods at that earlier date and not at the date of the judgment (f).

(t) *Clayton v. Le Roy*, [1911] 2 K. B. 1031.

(u) This is the result of *Shelbury v. Scotsford* (1603), Yelv. 22; *Biddle v. Bond* (1865), 6 B. & S. 225, 233; *Rogers, Sons & Co. v. Lambert & Co.*, [1891] 1 Q. B. 318, 328.

(a) *Rogers' Case*, last note; *Blaustein v. Maltz & Co.*, [1937] 2 K. B. 142, marks the limits of this exception and of the doctrine of *jus tertii* itself.

(b) Annual Practice, Appendix F; Forms of Judgment, No. 2A (ii); *Peters v. Heyward* (1623), Cro. Jac. 682.

(c) *Anderson v. Passman* (1835), 7 C. & P. 193.

(d) *Williams v. Archer* (1847), 5 C. B. 318.

(e) *Rosenthal v. Alderton & Sons, Ltd.*, [1946] K. B. 374.

(f) *Sachs v. Miklos*, [1948] 1 A. E. R. 67.

§§ 103, 104. Until the Common Law Procedure Act, 1854 (*g*), the defendant always had the right to keep the article if he paid its value, but the Court was empowered by that Act to use its discretion in ordering restitution of the property, and that power is now general and is not limited to detinue: it is enforced by a "writ of delivery" (*h*). But this remedy, in view of its drastic character, is not granted if damages would be adequate compensation, and they are adequate for any ordinary article of commerce of no special value: *e.g.*, an ordinary piano (*i*).

Detinue is distinct from the action for conversion in that the latter is never available for mere detention without any wrong to the plaintiff's title; if the defendant's detention is accompanied by an assertion of title on his own part, then he may well be suable in conversion as well as in detinue. Detinue differs from the action for trespass to chattels, because the latter does not necessarily involve detaining the chattel at all; a blow to it will suffice. But if the trespasser carries off the chattel, he may be liable in detinue as well as in trespass.

Replevin.

§ 104. Replevin.

By far the commonest use of replevin is where goods have been wrongfully seized by way of distress. Indeed, Coke (*j*) and Blackstone (*k*) thought that it had no other use, but there is enough show of Common Law authority to make it applicable to the recovery of property taken otherwise than by distress (*l*), although it is very rarely so employed; and now there is statutory warrant for its general application in the County Courts Act, 1934 (*m*).

The procedure in the action is to apply to the Registrar of the County Court, who will see that the goods alleged to have been wrongfully taken are restored to the plaintiff on his giving security to prosecute an action of replevin in the County Court

(*g*) 17 & 18 Vict. c. 125, s. 78.

(*h*) Rules of the Supreme Court, Order 48, rule 1.

(*i*) *Whiteley v. Hill*, [1918] 2 K. B. 808, 819.

(*j*) Co. Litt. 145b.

(*k*) Comm., iii, 146.

(*l*) Coleridge, J.'s judgment in *Mennie v. Blake* (1856), 6 E. & B. 842, 846—850; Lord Ellenborough, C.J., in *Dore v. Wilkinson* (1817), 2 Stark 287, 288.

(*m*) 24 & 25 Geo. 5, c. 53, ss. 101—103, replacing the County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 133—136.

or in the High Court (n). Thus the plaintiff gets the benefit of having his goods without being obliged to wait until it is decided whether he is entitled to them or not, and the defendant is sufficiently protected by the security which will, of course, be forfeited to him if the distress is shown to be lawful. §§ 104—106.

Replevin is not available unless the taking of the goods is a trespass, for the allegation in the old pleadings was that the defendant "took and detained" the goods; hence it will not lie against a carrier who detains them, for he is in possession already; detinue or trover may, however, lie against him (o).

§ 105. Trespass to goods.

Trespass to goods.

No more need be added here to what was said in §§ 99—101 on this topic except to emphasise the distinction between trespass and conversion. In the first place, it is true that in many instances the same facts may constitute both torts, as where a man steals my goods, for he has committed trespass by meddling with my possession, and conversion by appropriating something of mine for his own purposes and thus interfering with my title to the goods, *i.e.*, with my right to possess them. But interference with possession and with nothing else cannot be conversion. Secondly, if the plaintiff had not possession of the goods, trespass to them cannot be committed against him; on the other hand, conversion may possibly be committed where the plaintiff has bare ownership, but not possession, *e.g.*, where a bailee misappropriates goods bailed to him; and it is also possible where, though the plaintiff had possession, yet the defendant never disturbed it, as where he does some act amounting to an absolute denial of the plaintiff's title (p). Thirdly, the measure of damages is different, for in conversion it is usually the full value of the goods, while trespass may be of such a trivial character that damages may be merely nominal.

§ 106. Conversion (q).

Conversion defined.

We have now cleared the way for an analysis of the present law of conversion. The tort may be defined as *any act in*

(n) Annual County Courts Practice, note on s. 101 of Act.

(o) *Galloway v. Bird* (1827), 4 Bing. 299; *Mennie v. Blake* (1856), 6 E. & B. 842.

(p) *Oakley v. Lyster*, [1931] 1 K. B. 148.

(q) For a monograph on the Anglo-American law, see Professor E. H. Warren, *Trover and Conversion* (1936); for American law in particular, see

§§ 106, 107. *relation to the goods of a person which constitutes an unjustifiable denial of his title to them.*

Title of
plaintiff.

§ 107. *Title of plaintiff.*—What kind of right to the goods must the plaintiff have in order that interference with it may amount to conversion? The answer is that he can maintain the action if at the time of the defendant's act he had (1) ownership and possession of the goods; or (2) possession of them; or (3) an immediate right to possess them, but without either ownership or actual possession (*r*): but in this third case he will lose his action if the defendant proves that the title to the goods is in some third party. This seems to be the law, but it can be elicited only from a great confusion of terminology in the reports. Thus it is said in several cases that the plaintiff must have "a right of property in the thing and a right of possession" and that unless both these rights concur the action will not lie (*s*). If "right of property" means "ownership", this might lead one to infer that no one can sue for conversion except an owner in possession at the date of the alleged conversion. But that is not so, for a bailee has only possession and not ownership (which remains in the bailor), and yet the bailee can sue a third party for conversion (*t*). And, as we shall see (§ 108), the rules as to *jus tertii* show that, in general, one who has mere possession at the date of the conversion can sue, and that even one who has a right to possess, and nothing more, can do so provided no *jus tertii* be proved by the defendant.

Examples
of right to
possess.

There is no need to enlarge upon (1) ownership and possession, or (2) possession, for possession was analysed in Chapter XII. But (3) the immediate right to possess must be briefly examined. A reversionary owner out of possession certainly has not got it, *e.g.*, a landlord of premises let together with furniture to a tenant whose term is still unexpired; if the furniture is wrongfully seized by the sheriff, it is the tenant

65 Corpus Juris, 1—178; cf. American Restatement of the Law of Tort, Vol. I, Chaps. 9, 10.

(*r*) The definition of Atkin, J., in *Lancashire and Yorks. Ry. v. Mac-Nicoll* (1919), 83 L. J. K. B. 601, 605 (adopted by Scrutton, L.J., in *Oakley v. Lyster*, [1931] 1 K. B. 148, 153, and by Lord Porter in *Caxton Publishing Co., Ltd. v. Sutherland Publishing Co., Ltd.*, [1939] A. C. 178, 201—202) needs extension to include No. 3, *supra*.

(*s*) *Gordon v. Harper* (1796), 7 T. R. 9, 12; *Bloxam v. Sanders* (1825), 9 B. & C. 941, 950; *Owen v. Knight* (1837), 4 Bing. N. C. 54, 57; *Bradley v. Copley* (1845), 1 C. B. 685

(*t*) *Burton v. Hughes* (1824), 2 Bing. 173.

and not the landlord who can sue for conversion (*u*). Again, a servant in custody of his master's goods (*e.g.*, a butler with respect to the plate) has not possession of them, for it is constructively in the master. But if the master has made him a bailee of them so as to vest him with exclusive possession, then, like any other bailee of this sort, he has it; so, too, if goods are delivered to him to hand to his master, he has possession of them until he has done some act which transfers it to his master: *e.g.*, a shop-assistant has possession of money paid to him by a customer until he puts it in the till (*v*). Up to that moment the master has only the right to possess. These examples are tolerably plain, but it must depend to a large extent on the facts of each case whether the law will attribute to a person the immediate right to possess. A bailor has it against a mere bailee at pleasure. In *Manders v. Williams* (*a*), brewers supplied porter in casks to a publican on condition that he returned the empty casks; held, they could maintain trover against a sheriff who took the casks in execution for the publican's debts, for directly they were emptied the right to immediate possession was in the brewers, the publican becoming a mere bailee at will (*b*). So, too, if furniture dealers transfer furniture on the hire-purchase system to X with an express proviso that the hiring is to terminate without any notice if the goods are taken in execution for debt, they can sue the sheriff in trover if he levies execution on them (*c*). Not that every disposition of furniture on this system constitutes conversion; the terms of the agreement must be scrutinised (*d*) and furniture dealers, if they wish to protect themselves, must draw their contracts with some minuteness as to forfeiture of the hirer's interest (*e*).

In a simple bailment, *i.e.*, one which does not exclude the bailor from possession (*e.g.*, loan of a bicycle to a friend), an action for conversion against a third person is maintainable

(*u*) *Gordon v. Harper* (1796), 7 T. R. 9.

(*v*) Clerk & Lindsell, *Torts*, 422, 446, where the general denial of possession to a servant is regarded as an anomalous survival. The rule has certainly veered round since Tudor times: Pollock & Wright, *Possession*, 59–60.

(*a*) (1849), 4 Ex. 339.

(*b*) Distinguish *Bradley v. Copley* (1845), 1 C. B. 685, where, upon the construction of a bill of sale, demand was held to be necessary to confer the immediate right to possess.

(*c*) *Jelks v. Hayward*, [1905] 2 K. R. 460.

(*d*) *Whiteley, Ltd. v. Hilt*, [1918] 2 K. R. 808.

(*e*) W. G. Earency, *Hire-Purchase* (2nd ed. 1938), 70 *et seq.*

§ 107.

by either bailor or bailee (f); by the bailee because he is in possession, by the bailor because it is said that his title to the goods draws with it the right to possession, that the bailee is something like his servant and that the possession of the one is equivalent to that of the other (g). Nor is it material to the bailee's right of action that he is not liable over to the bailor for the third party's injury to the goods (h); but the latter cannot be made liable twice over and if he has been cast in damages to the one, he cannot be sued by the other (i).

A buyer of goods can sue the seller or a third party for conversion if he has ownership of the goods even though he has not yet got possession of them; but he cannot do so if ownership has passed to such third person by reason of some exception to the rule *nemo dat quod non habet*, e.g., by *bona fide* purchase for value in market overt (k).

A person who is entitled to the temporary possession of a chattel and who delivers it back to the owner for a special purpose may, after that purpose is satisfied and during the existence of his temporary right, sue the owner for conversion of it (l); *a fortiori* he can sue any one else.

One co-owner of property can sue the other for conversion only if the wrongful act amounts to destruction of the property or to complete exclusion of the plaintiff from it. In *Nyberg v. Handelaar* (m), there was held to be such complete exclusion when A and B were co-owners of a gold enamel box and A entrusted B with its possession to take to an auctioneer for sale and B, instead of doing so, pledged the box with C as security for a debt of B.

(f) *Nicolls v. Bastard* (1835), 2 C. M. & R. 659; 5 L. J. Ex. 7.

(g) *Williams*, Personal Property (18th ed. 1926), 59; *Manders v. Williams* (1849), 4 Ex. 339, 344 (*per Parke, B.*). The extension of remedies to the bailor was a gradual process (*Holdsworth*, Hist. of English Law, iii, 348—349), nor has any adequate explanation been offered why he should retain the "special property" in the goods which gives him a right to sue a third party for conversion; but, however that may be, it was recognised that he could sue *trover* as early as 1471: *Y. B. Mich.* 12 Edw. IV, f. 12a, *per Brian, C.J.*, C.P.

(h) *The Winkfield*, [1902] P. 42.

(i) *Bacon*, Abr. (7th ed. 1832), vii, 805. *Eastern Construction Co., Ltd. v. National Trust Co., Ltd.*, [1914] A. C. 197, 210.

(k) See, too, *Chalmers*, Sale of Goods (11th ed. 1931), 136—137. Note that if the goods remain in the seller's possession subject to his lien for their unpaid price, the buyer cannot sue a wrongdoer for conversion: *Lord v. Price* (1874), L. R. 9 Ex. 54.

(l) *Roberts v. Wyatt* (1810), 2 Taunt. 268.

(m) [1892] 2 Q. B. 202.

§ 108. *Jus tertii*.

§ 108.

As said above, it is quite possible for one who had only a right to possess at the date of the conversion to bring an action for it, subject to his being met by a plea of *jus tertii*, i.e., that some third party has a title superior to his own. It is necessary to examine more fully the extent of this plea.

Jus tertii.

(1) Where the plaintiff was *in possession* at the time of the conversion, the defendant cannot set up *jus tertii*. In *Armory v. Delamirie* (n), a chimney-sweep's boy found a jewel and handed it to a goldsmith's apprentice to value. Under pretence of weighing it, he extracted the jewel from its setting and offered the boy the setting and 1½d. for the jewel. The boy took the first and refused the second and sued the goldsmith in trover. The defence that the boy was not the owner of the jewel was held to be bad; for the boy had possession of the jewel when he handed it to the apprentice nor did his parting with it for this particular and temporary purpose amount to parting with the possession which he had acquired by finding (o). Later authorities are to the same effect, and the rule that "against a wrongdoer possession is a title" and that possession raises a presumption of ownership is a very sensible one in the interests of the peace and quiet of the community (p). An exception to the rule that *jus tertii* is not pleadable against a possessor occurs where the defendant "claims under it" (q), an expression which seems to mean that the defendant can set up the right of a third person if he has the authority of that person to do so (r).

Not available
against
possessor.

(2) Where the plaintiff was *not in possession* at the time of the conversion, i.e., where he had only the right to possess, *jus tertii* can be pleaded by the defendant. In *Leake v.*

Available
against non-
possessor.

(n) (1721), 1 Stra. 505.

(o) The case itself does not show this, but it is to be inferred from the facts of it, and it was assumed to be so by the C. A. in *The Winkfield*, [1902] P. 55. See, too, 1 Smith L. C. (13th ed. 1929), 393-394.

(p) Lord Campbell, C.J., in *Jeffries v. G. W. Ry.* (1856), 5 E. & B. 802, 805; *Northam v. Bowden* (1855), 11 Ex. 70; *Glenwood Lumber Co., Ltd. v. Phillips*, [1904] A. C. 405, 410.

(q) Collins, M.R., in *The Winkfield*, [1902] P. 42, 54.

(r) A neat decision on the point in conversion is untraceable, but *dicta* indicate that it is the law: e.g., *The Jupiter* (No. 3), [1927] P. 122, 137, 254. The cases usually cited are on estoppel as between bailor and bailee.

Two other exceptions to the rule about *jus tertii* are given in Salmond, Torts, § 76 (9), but for one of them no authority is cited, and *Eastern Construction Co., Ltd. v. National Trust Co., Ltd.*, [1914] A. C. 197, 210, which is given for the other, does not support it, for there the defendant was pleading *jus sui*, not *jus tertii*.

§ 108.

Loveday (s), A bought goods of B and allowed B to remain in possession. B became bankrupt. B's assignees in bankruptcy made no claim to the goods and B still remained in possession of them. Later, the sheriff seized and sold them under a writ of *fiery facias* against B and handed the proceeds to B's assignees. A sued the sheriff in trover. Held, the sheriff might set up the assignees' title.

Why is *jus tertii* pleadable here and not where the plaintiff was in possession? The explanation is historical. If the act constituting conversion of the chattel also amounted to dispossession of the plaintiff, he had the same advantages in suing trover as if he were suing in trespass, and one of these advantages was (and still is) that the possession which the plaintiff had at the moment that the thing was taken from him is a good title against a wrongdoer. But if the plaintiff were out of possession, then no act of conversion could also be an act of trespass, for trespass is a wrong to possession; the plaintiff must rely upon conversion alone, and as conversion infringes the plaintiff's title to the chattel, it is only fair that the defendant should be allowed to prove that the title is in some one else (t).

Except
against
bailor.

In one case, however, *jus tertii* is not pleadable even where the plaintiff has only a right to possess. A bailee, if sued by his bailor, is estopped from denying the plaintiff's title, although, of course, he may have some other defence. For the bailor, when he delivers the goods to the bailee, is regarded as representing to him that he may safely accept them and, on that representation, the bailee is deemed to promise to redeliver them. Having thus acknowledged that he holds the goods on the bailor's account, he cannot blow hot and blow cold by denying the bailor's title (u); but he can do so if he has been evicted from the goods by some one having a title paramount to that of the bailor (a), or if he is defending the action on behalf, and by the authority, of some third person. If he is subjected to competing claims by the bailor and some third party, he can escape the quandary by interpleader

(s) (1842), 4 M. & G. 972.

(t) Pollock & Wright, *Possession*, 91—92. Cf. Holdsworth, *Hist. of English Law*, vii, 424—430.

(u) *Ross v. Edwards* (1895), 73 Ll. T. 100, 101. The rule is old enough e.g., Martyn, J., refers to it in *Y. B. Pasch. 7 Hen. 6, f. 22, pl. 3.*

(a) *Ross v. Edwards* (last note); *Biddle v. Bond* (1865), 6 B. & S. 225; distinguished in *Blaustein v. Maltz & Co.*, [1937] 2 K. B. 142.

proceedings which enable him to drop out of the litigation and / §§ 108, 109.
leave the other two to fight it out between themselves (b).

It may be noted here that, quite apart from bailee and bailor, it is possible for a defendant in conversion to be estopped from denying that he has committed it, *e.g.*, where he has made some negligent misrepresentation with respect to his title to the goods and the plaintiff has acted upon it and has thereby suffered damage (c); but cases of this sort belong to the rules peculiar to estoppel which cannot be detailed here (d).

§ 109. What constitutes conversion.

What constitutes conversion.

There can be no conversion unless the defendant's conduct in relation to the goods amounts to an unjustifiable denial (e) of the plaintiff's title to them, or an assertion of a right inconsistent with that title.

It is possible for you to commit conversion of my goods by wrongfully (i) taking possession of them, or (ii) abusing possession of them when you have already got it, or even (iii) denying my title to them, although you have never had possession at all, provided your denial is absolute.

(i) As to taking possession of them, that by itself will not always be conversion. If I snatch your hat from your head and throw it at another person, that is trespass to your hat but it is not conversion, for I am not questioning your title to it. But if I take it from you with intent to steal it, that is conversion as well as trespass. Hence, although trespass and conversion often coincide, *Fouldes v. Willoughby* (f) furnishes another illustration that this is not always so. A and his horses had embarked on B's ferry-boat. Some dispute arose between A and B before the boat started and B requested A to remove the horses. A refused to do so, whereupon B put them ashore and A, as he declined to leave the boat, was

(i) Taking possession

(b) Rules of the Supreme Court, Order 57.

(c) *Seton v. Lafon*. (1887), 19 Q. B. D. 68.

(d) They have been put under a rubric "Conversion by estoppel" in Salmond, Torts, § 75, but the phrase is rather dangerous, for it tends to obscure the fact that estoppel is only a rule of evidence, not a cause of action: Everest & Strode, Estoppel (3rd ed. 1923), 1—2; the learned editor of Salmond admits this: Torts, p. 299, note (2).

(e) The denial is not necessarily justifiable merely because the goods have come into the defendant's possession under an illegal contract between himself and the plaintiff: *Bowmakers, Ltd. v. Barnet Instruments, Ltd.*, [1945] K. B. 65.

(f) (1841), 8 M. & W. 540 (W. Cases, 137).

§ 109.

carried across the river. It was held that B's act, although it might have been trespass to the horses, was not conversion of them, for, far from interfering with A's title to them, B had throughout the transaction recognised it (*g*). So, too, if you shift my bicycle from a public stand for cycles in order to get at your own, and forget to replace mine so that it is stolen by some one, that may be trespass, but it is not conversion (*h*).

(ii) Abusing possession.

(ii) Abuse of possession which the defendant already has may take many forms, such as sale accompanied by delivery of the plaintiff's goods or their documents of title to another (*i*), pawning them (*k*), or otherwise disposing of them. So, too, destruction of them or altering their nature. If I make an omelette of your eggs or a statue out of your block of marble, that is conversion. The question to whom the omelette and the statue belong is another matter, and Sir John Salmond (*l*) pointed out that the attempts of the older lawyers to transplant the Roman Law of *specificatio*, *confusio* and the like to our system are of small practical use at the present day. and that the better method of solving the question is to split it into, "Who owns the newly created thing?" and "Who is entitled to possession of it?" The probable answer to the first inquiry is that ownership of material is unchanged by alteration of it; to the second, that the Court will use its discretion in making an order for specific restitution and will award the thing to him whose interest is the more substantial, on condition that he pays the value of the other's interest. Thus, the statue would be awarded to the sculptor. Where the article is perishable, like an ice or an omelette, recovery of its value can be the only remedy.

(iii) Denying title.

(iii) Conversion by mere denial of another's title to his property is illustrated by *Oakley v. Lyster* (*m*). A, the tenant of Blackacre, let three and a half acres of it to B to enable B to dump material on it, pending sale of the material. While B's tenancy was in existence C acquired the freehold of Blackacre, used some of the material dumped on the three

(*g*) 8 M. & W. 549. So, too, *Price v. Helyar* (1828), 4 Bing. 597, 601.

(*h*) Cf. *Bushel v. Miller* (1718), 1 Stra. 128.

(*i*) *Hollins v. Fowler* (1875), L. R. 7 H. L. 757.

(*k*) *Parker v. Godin* (1728), 2 Stra. 813.

(*l*) Torts, § 88 (3).

(*m*) [1931] 1 K. B. 148 (W. Cases, 140). Cf. *Ashby v. Tolhurst*, [1937] 2 K. B. 242 (car-park attendant innocently allowed A to take away B's car; held, not to be conversion).

and a half acres and, in a letter to B, asserted ownership over the whole of the material. The Court of Appeal held that C had committed conversion even with respect to that part of the material of which he had never been in possession. But, the denial of the plaintiff's title must be absolute. In *England v. Cowley* (n), a landlord was held not to have committed conversion by merely telling the plaintiff, who held a bill of sale over the tenant's goods, that they were not to be removed until the tenant's arrears of rent had been paid. "It is not enough that a man should say that *something* shall not be done by the plaintiff; he must say that *nothing* shall" (o); otherwise it would be conversion if one were to say to a man about to take his pistol out of a drawer in order to fight a duel, "You shall not take it" (p).

§ 109.

Finding.—The popular saying that "Finding is keeping" is a dangerous half-truth, which needs a good deal of expansion and qualification to make it square with the law.

A finder of a chattel has such a title as will enable him to keep it against every one, with two exceptions:

(1) The rightful owner. Far from getting any title against him, the finder, if he appropriates the chattel, not only commits the tort of conversion but is also guilty of the crime of stealing if at the time of appropriation he knows or has reasonable grounds for believing, that the owner can be found, and does not believe that the owner had abandoned the chattel (q).

(2) If the rightful owner makes no claim, it is doubtful how far the possessor of the land on which the chattel is found has a title superior to that of the finder.

It will be recollected that, in *Armory v. Delamirie* (r), the chimney-sweep's boy was held to have a sufficient title to the jewel, which he had found, to enable him to maintain trover against the goldsmith to whose servant he had handed it for purposes of valuation. Now, no claim was made by the owner of the house in the chimney of which the jewel was presumably

(n) (1873), 1 L. R. 8 Ex. 126.

(o) Bramwell, B., *ibid.*, at p. 130.

(p) In 47 Law Quarterly Review (1931), 168—171, Professor Goodhart adversely criticises *Oakley v. Lyster* and urges that, while the conduct of the defendant might have been the tort of slander of title, it is doubtful whether it was really conversion.

(q) *Cartwright v. Green* (1803), 8 Ves. Jun. 406; *Merry v. Green* (1841), 7 M. & W. 623. Kenny, Criminal Law (15th ed. 1936), 244—245.

(r) (1721), 1 Stra. 505. *Ante*, p. 353.

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found (s). But if he had made such a claim (assuming, of course, that he was not the owner of the jewel) would it have been successful? Certainly not against the true owner. But would he have been entitled as against the finder? The answer to this is uncertain, but the principles of it may, perhaps, be extracted from a passage in Pollock and Wright, *Possession in the Common Law*, and from a dictum of Lord Russell, C.J., in *South Staffs Water Co. v. Sharman*. According to Pollock and Wright (p. 41): "The possession of land carries with it in general, by our law, possession of everything which is attached to or under that land, and in the absence of a better title elsewhere, the right to possess it also. And it makes no difference that the possessor is not aware of the thing's existence. . . . It is free to any one who requires a specific intention as part of a *de facto* possession to treat this as a positive rule of law. But it seems preferable to say that the legal possession rests on a real *de facto* possession constituted by the occupier's general power and intent to exclude unauthorised interference". This passage was made the *ratio decidendi* in *South Staffs Water Co. v. Sharman* (t), where the plaintiffs employed the defendant to clean out a pool on their land and in doing so he found two gold rings in the mud. Their owner was untraceable, and it was held that the plaintiffs were entitled to them. Lord Russell, C.J., said: "The general principle seems to me to be that where a person has possession of house or land, with a manifest intention to exercise control over it and the things which may be upon or in it, then, if something is found on that land, whether by an employee of the owner or by a stranger, the presumption is that the possession of that thing is in the owner of the *locus in quo*" (u). Ten years earlier it had been held, in *Elwes v. Brigg Gas Co.* (a), that the title to a boat 2,000 years old embedded in the plaintiff's land was in him, and not in the defendants, who were lessees of the land and who had discovered the boat in excavating the land for the purpose of constructing a gasometer; for the plaintiff "was in possession of the ground, not merely of the surface, but of everything that lay beneath the surface down to the

(s) The report does not state where it was found.

(t) [1896] 2 Q. B. 44, 46-47.

(u) *Ibid.*, 47.

(a) (1886), 33 Ch. D. 562.

centre of the earth, and consequently in possession of the boat" (b). The lease had not conferred upon the defendants possession, but only a licence to remove the excavated soil. The law, then, seems to be that, where things are found in or upon land and their owner is untraceable, the possessor of the land is presumed to be the possessor of the things; but that this presumption is rebuttable by evidence that the possessor had no manifest intention to exercise control over the things. Thus, if A gives the public permission to use his park as a pleasure-ground and a member of a picnic party there throws away a half empty sardine tin which is found and appropriated by a member of another picnic party, the latter ought to get a good title to the tin, for it would be absurd to hold that A is in possession of an article which, if he were aware of its existence, he would probably repudiate as noxious rubbish.

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The still earlier case of *Bridges v. Hawkesworth* (c) is by no means easy to reconcile with the principle just stated. There the plaintiff entered the defendant's shop on business and picked up from the shop floor some bank notes dropped by an unknown person. Until then, the defendant did not know the notes were on his premises. The plaintiff handed them to the defendant to see if the owner could be traced. He could not, and it was held that the plaintiff was entitled to maintain trover for the notes against the defendant because "the notes never were in the custody of the defendant, nor within the protection of his house, before they were found" and it was a mistake to think "that the place in which the notes were found makes any legal difference" to the rule about the finder's title. We have pointed out in an earlier chapter (d) that it seems possible for a man to have possession of a chattel even if he does not know that he has got it, so that the first of these reasons is questionable. And it might be thought that the second is inconsistent with the decisions in the two later cases. It is true that in one of these, *Sharman's Case* (e), Lord Russell, C.J., tried to distinguish *Bridges' Case*, but the attempt was unfortunate. He said that there the notes were dropped and found in a public shop. This was not the *ratio*

(b) *Ibid.*, 568.

(c) (1851), 15 Jur. 1079 (the best report); 21 L. J. Q. B. 75.

(d) *Ante*, § 91.

(e) [1896] 2 Q. B. at p. 47

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decidendi of *Bridges' Case* (f), and many difficulties may arise in determining whether a place is "public" or not. "Is the public", asks Professor A. L. Goodhart, "invited to a doctor's consulting room, a solicitor's office, a tailor's shop, a theatre, a restaurant, or a store? For some purposes a theatre is a public place in law, while for others it is private; which is it for the purpose of possession?" (g). It can scarcely be urged that, in the light of the later cases, the facts in *Bridges' Case* rebutted the presumption that the possessor of the land was the possessor of the bank notes, for the presumption ought to be a strong one, otherwise trespass and disorder on his premises would be encouraged, especially where the articles found there are valuable. It is submitted that *Bridges' Case* ought to be overruled (h).

Mere reception of goods.

✓ *Mere reception of goods.*—Where A, without lawful authority, transfers B's goods to C, the mere voluntary reception of them by C is in general conversion, however innocent C may be. This is abundantly supported by decisions with respect to receipt of goods by a buyer (i) and receipt of a cheque by a banker (k), and there are judicial dicta that appear to regard the rule as of general application (l). Some

(f) See Professor Goodhart's pungent criticism in *Essays in Jurisprudence*, 75—90.

(g) *Ibid.*, 80.

(h) It was followed in *Hannah v. Peel*, [1945] K. B. 509, but it is respectfully submitted that, if our analysis of the law in the text above is correct, Birkett, J., might have based his decision on the ground that the defendant, though he owned the premises on which the plaintiff (who was lawfully on the premises) had found a brooch, had not occupied them until after the plaintiff had found the brooch. It seems to be implied in the *ratio decidendi* of *South Staffs Water Co. v. Sharman* (*ante*, p. 358) that unless the owner or possessor of land is (either personally or by his agent) also occupier of it, the presumption that he is possessor of any chattel on it does not arise. See 61 L. Q. R. 333—334.

(i) *Wilkinson v. King* (1809), 2 Camp. 335; *Farrant v. —* (1822), 3 Stark. 130 (further reported as *Farrant v. Thompson*, 5 B. & Ald. 826). *Dyer v. Pearson* (1824), 3 B. & C. 38; *Hilbery v. Hatton* (1864), 2 H. & C. 822. Mere sale, without delivery of the goods or documents of title thereto, is not conversion: *Lancashire Waggon Co., Ltd. v. Fitzhugh* (1861), 6 H. & N. 502; Collins, J., in *Consolidated Co. v. Curtis*, [1892] 1 Q. B. 495, 498; but it may be slander of title, *post*, § 170 (3).

(k) *Fine Art Society v. Union Bank of London* (1886), 17 Q. B. D. 705; *Gordon v. London City and Midland Bank*, [1902] 1 K. B. 212, 265; *Morison v. London County and Westminster Bank*, [1914] 3 K. B. 356, 364; *Reckitt v. Barnett*, [1928] 2 K. B. 244, 263; [1929] A. C. 726; *Lloyds Bank v. Chartered Bank*, [1929] 1 K. B. 40, 69.

(l) "Certainly a man is guilty of conversion who takes my property by assignment from another who has no authority to dispose of it; for what is that but assisting that other in carrying his wrongful act into effect": Lord Ellenborough, C.J., in *M'Combie v. Davies* (1805), 6 East 538; cited with approval in all five cases in last note; distinguished in *Spackman v*

qualifications of it for which there is good foundation are discussed below (m). A more questionable exception appears in *Spackman v. Foster* (n). In 1859, A wrongfully deposited the title deeds of B's lands with C, to secure repayment of money lent to A by C. C took the deeds in good faith. In 1882, B demanded from C the return of the deeds. C refused. B sued C for conversion. C pleaded that the action was barred by lapse of time under the Statute of Limitation. It was held that C's mere receipt of the deeds in 1859 was not conversion, that there was no conversion until the demand and refusal in 1882, that the Statute of Limitation was therefore not applicable and that C was liable. This decision was inconsistent with earlier authority (o) and, although it was followed by the Court of Appeal in *Miller v. Dell* (p), neither case exhibits any reason for distinguishing innocent receipt of goods by way of pledge from similar receipt by way of sale (q).

Involuntary reception of goods is not conversion. Such is the case of an innocent person into whose pocket a thief, in order to escape detection, inserts a purse which he has stolen from a third person. Even where the receiver knows that the thing belongs to some one else, he incurs no liability by having it thrust upon him. Pushing tradesmen occasionally send unsolicited goods to persons for trial. The law as to an "involuntary bailee" of this kind may be thus stated:—

The "involuntary bailee".

(1) He cannot, without his knowledge or consent, be made a bailee in the strict sense of that term. In *Lethbridge v. Phillips* (r), L, a celebrated miniature painter, lent a miniature to B who wished to show it to the defendant. B sent it to the defendant without any previous knowledge or consent on

Foster (note (n)) on the ground that in *M'Combie's Case* there was a demand that the innocent pledgee should restore the goods and a refusal by him to do so; *sed qu.*, for demand and refusal are not the only mode in which conversion can be committed (*post*, p. 363).

(m) Pp. 361—366.

(n) (1883), 11 Q. B. D. 99.

(o) *Packer v. Gillies* (1806), 2 Camp. 336, note; *Boyson v. Cole* (1817), 6 M. & S. 14; cf. *Cole v. North Western Bank* (1875), L. R. 10 C. P. 354. None of these cases was cited in *Spackman v. Foster*.

(p) [1891] 1 Q. B. 468. The *obiter dicta* in *Union Credit Bank v. Mersey Docks, etc. Board*, [1899] 2 Q. B. 205, 214—216, might also support *Spackman v. Foster*.

(q) In *Miller v. Dell*, at pp. 471—472, Lord Esher, M.R., was emphatic that title deeds of land are not like ordinary chattels, but he certainly gave no hint that they are incapable of conversion. The American Restatement of Tort, § 223, draws no distinction between the pledgee and other recipients:

(r) (1819), 2 Starkie 544.

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the defendant's part. The miniature was much damaged by being placed near a large stove in the house of the defendant who was nevertheless held not liable to L.

(2) Mere negligence on the part of the recipient with respect to the safe custody of the thing will not make him liable. So, in *Howard v. Harris* (s), where a playwright sent the MS. of a play to a theatrical producer who had never asked for it and who lost it, the producer was held not liable.

(3) But he must not wilfully damage or destroy the thing (t). The law has not, however, been fully explored here. It is simple enough with a small and imperishable article like a book or a fountain pen, but what of a parcel of fish or a piano which is delivered at my house in my absence? I can distrain them damage feasant, but what I want to do is to get rid of them and I am certainly not bound to incur the expense of packing and returning them. If the sender is traceable, probably the most sensible thing to do is to notify him that the goods are at his risk and to request him to fetch them; and, if (as is likely with perishables or wild animals) the goods become a nuisance, the recipient would surely be justified in abating the nuisance by destroying them, even without notice to the sender, if the emergency were so pressing as to leave him no time to give it.

(4) The recipient does no wrong if he tries to return the goods by an apparently trustworthy agent of the sender. In *Elvin & Powell, Ltd. v. Plummer Roddis, Ltd.* (u), X, a swindler, directed the plaintiffs to supply the defendants at Brighton with £350 worth of coats. X then forged a telegram to the defendants: "Goods dispatched to your branch in error.—Sending van to collect. Elvin and Powell." Then a confederate of X called on the defendants, who delivered the coats to him under the impression that he was the plaintiffs' agent. The confederate disappeared. The plaintiffs sued the defendants for (i) negligence as bailees, and (ii) conversion. The jury negatived negligence and found that there was contributory negligence on the plaintiffs' part, and Hawke, J., held that there was no conversion, for the defendants had acted

(s) (1884), *Cababé & Ellis*, 253. Cf. *misdelivery*: 186 L. T. Newspaper, 252—253.

(t) "I am not bound to warehouse it, nor am I entitled to turn it into the street": *Bramwell, B., obiter*, in *Hiort v. Bott* (1874), L. R. 9 Ex. 86, 90.

(u) (1933), 50 T. L. R. 158.

reasonably (a). Contrast with this case *Hiort v. Bott* (b), where A-mistakenly sent an invoice for barley to B (who had ordered none), which stated that B had bought the barley of A through G as broker; and A also sent to B a delivery order which made the barley deliverable to the order of A or of B. G then told B there had been a mistake and got B to indorse the delivery order to G, who thereby got hold of the barley, disposed of it and absconded. Here B was held liable to A for conversion. Had he merely handed the delivery order to G for return to A, the decision might have been otherwise, but by indorsing it to G he had gone far beyond what was necessary to secure the return of it to A.

Demand and refusal.—A demand by the plaintiff for the return of the goods met by a refusal of the defendant is one of the common ways of producing evidence of conversion. But it is quite possible to prove it in other ways (c), and even where there is a refusal it must be unconditional or, if accompanied by a condition, the condition must be an unreasonable one. Thus it is certainly not unreasonable to refuse to give up a bank note which you pick up in the street to the first stranger who alleges it to be his, if you tell him that you must make further inquiries or that he must produce evidence which will authenticate his claim (d). Whether the length of time spent in making these inquiries and the mode in which they are made are reasonable, or not, may be nice questions (e).

Demand and refusal.

Honest but mistaken belief of the defendant that he had the right to deal with the goods is generally no defence. In *Hollins v. Fowler* (f), the House of Lords put this rule, which had been recognised long before, on a highly authoritative basis, for the puisne Judges were summoned to advise them. B fraudulently obtained possession of cotton from Fowler. Hollins, a cotton broker who was ignorant of the fraud, bought it from B and resold it to another person, receiving only broker's commission. Hollins was held liable to Fowler for conversion of the cotton. Lord Ellenborough, C.J., had said some sixty years earlier that "a person is guilty of

Bona fides of defendant.

(a) So, too, *Batistoni v. Dance* (1908), 52 Sol. J. 202.

(b) (1874), L. R. 9 Ex. 86.

(c) *Philpott v. Kelley* (1835), 3 A. & E. 106.

(d) *Green v. Dunn* (1811), 3 Camp. 215. n.; *Alexander v. Southey* (1821), 5 B. & Ald. 247; *Clayton v. Le Roy*, [1911] 2 K. B. 1031.

(e) *E.g.*, *Burroughes v. Bayne* (1860), 5 H. & N. 296, where the Court was not unanimous.

(f) (1875), L. R. 7 H. L. 757 (W. Cases, 141).

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conversion who intermeddles with my property and disposes of it, and it is no answer that he acted under authority from another, who had himself no authority to dispose of it. And the Court is governed by the principle of law and not by the hardship of any particular case" (g). Thus Judges have recognised the hardship of the rule, but have also noticed its inevitability in a situation which frequently arises in the law. Of two morally innocent persons one has to suffer, and if Hollins felt justly aggrieved at the decision, Fowler's grievance would have been neither greater nor less if judgment had been given against him.

But there are many exceptions to the rule that innocent mistake is no defence. It is necessary to emphasise this, for it has been somewhat hastily inferred that, because an auctioneer has been held liable for innocently selling goods of another person (h) and a sheriff for mistaken execution of a writ (i), innocence is never a defence. But that is not so. In this branch of the law, there are occasions on which a balance must be struck between two competing principles. One is that ownership of property must be protected. The other is that speedy commerce in goods should be facilitated. Business could scarcely be carried on if every time I bought goods I were to ask the seller to prove his right to sell them. Hence, where X, a *bona fide* transferee for value, gets from A goods belonging to B who never intended to part with them, it will be found that both by statute (k) and under the Common Law (l) there are many instances in which X is deemed to commit no conversion and gets a good title even against B, although A is, of course, liable to B for conversion. Full discussion of these cases is to be found in books on the law of property.

But even outside these cases of *bona fide* purchase for value,

(g) *Stephens v. Elwall* (1815), 4 M. & S. 259, 261; followed in *Hollins v. Fowler* (*supra*); Blackburn, J., at pp. 764—765, 769—770; Lord O'Hagan at p. 798.

(h) *Consolidated Co. v. Curtis*, [1892] 1 Q. B. 495; where *National Mercantile Bank, Ltd. v. Ry mill* (1881), 44 L. T. 767, was distinguished (no conversion at all, quite apart from auctioneer's innocence). Cf. Scrutton, L.J., in *Underwood, Ltd. v. Bank of Liverpool*, [1924] 1 K. B. 775, 790—791; Clerk & Lindsell, *Torts*, 430—433.

(i) *Glasspole v. Young* (1829), 9 B. & C. 696.

(k) *E.g.*, Sale of Goods Act, 1893 (56 & 57 Vict. c. 71); Factors Act, 1889 (52 & 53 Vict. c. 45); Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61).

(l) *E.g.*, purchase in market overt (now adopted in the Sale of Goods Act, 1893, s. 22).

it may be that there are others in which, although he gets no title to the goods, one who handles them in good faith yet commits no conversion. What is the position of X, who innocently interferes with B's goods either upon his own initiative or upon the instructions of A, when X's acts amount to nothing more than transport or custody of the goods? *E.g.*, where a finder of goods removes them to a place of safety; or where a railway company, acting upon A's directions, carries B's goods, honestly believing that A has B's authority to give such directions (*m*); or where a wharfinger takes care of B's goods; or where a packer puts them up in parcels. Blackburn, J., in *Hollins v. Fowler*, thought that, in accordance with earlier authorities, these acts would not be conversion and he suggested that the principle is that "one who deals with goods at the request of the person who has the actual custody of them, in the *bona fide* belief that the custodian is the true owner, should be excused for what he does if the act is of such a nature as would be excused if done by the authority of the person in possession, if he was a finder of the goods or intrusted with their custody" (*n*). It must be confessed that this test is a rather artificial one. We have first to pretend that, in the event of A wrongfully directing an innocent person X to do something to B's goods, A is in the position of a finder or custodian of the goods; and then we must ask ourselves, "Would X's acts have been excused if these were the facts?" If aye, then X committed no conversion. But, allowing for this criticism, the test seems to be workable. It would protect all those persons in *Hollins v. Fowler* who merely handled the cotton ministerially and it would not save the man who had sold the cotton to another. Unfortunately, as Blackburn, J., himself admitted, it is doubtful how far it goes. Does it protect X if A wrongfully gives him B's wheat to grind into flour and he innocently does so? The learned Judge thought not (and indeed a mere finder of lost wheat could not authorise the grinding of it), and yet he felt that it would be hard to hold X liable. No doubt a finder of perishable commodities would be justified in taking any reasonable steps to preserve them pending the ascertainment

(*m*) Misdelivery of the goods by either a carrier or a warehouseman will render him liable for conversion: *Lancashire & Yorkshire Ry. v. MacNicol* (1919), 88 L. J. K. B. 601; *Duveroux v. Barclay* (1819), 3 B. & Ald. 702.

(*n*) L. R. 7 H. L., at pp. 766-767.

§§ 109, 110. of their owner; *e.g.*, he would not commit conversion by making jam of strawberries if that were the only mode of preserving them. But cases like these might well be based on the general defence of necessity (o).

Defences.

§ 110. Defences to conversion and other torts to goods.

Some of the defences to conversion and other torts to goods call for special mention owing to their peculiar applicability to these wrongs. Such are licence, distress, distress damage feasant and retaking of goods. The first three of these were considered in the chapter on Trespass to Land to which they are also relevant (p). It remains to examine the following:

Retaking
goods.

Retaking of goods.—This is a species of self-help. If A's goods are wrongfully in B's possession or control, there is no need for A to go to the expense of litigation to recover them. He can retake them, peaceably if he can, and in any event with no more force than is commensurate with the violence of B's resistance. Indeed, retaking may be his only opportunity of doing himself justice, for delay may mean destruction or conveying away of the goods by B who may be quite incapable of paying their value (q). It should be carefully noted that, while maiming or wounding are not justifiable for simple recaption of property, yet they may well become justifiable for another reason—self-defence. This may occur where B, in endeavouring wrongfully to resist A's attempt to recapture the goods, commits an assault upon A and so justifies A in using violence to protect himself. And if B's violence takes the form of assault with a deadly weapon, A may even inflict death if his own life is in peril. But, as the test is that A must use no more force than is necessary, and as this necessity varies with the facts of each case, self-help is likely to be just as dangerous a remedy here as elsewhere (r). Moreover, there are other qualifications of A's right to retake goods.

Qualifica-
tions :
(1) As to
persons.

(1) *With respect to persons.*—He can retake the goods not only from B, the original tortfeasor, but even from a third person subject to the apparent exceptions which arise where that third person has acquired a good title even against A. *e.g.*, by purchase in market overt from B or from any other

(o) *Ante*, § 18.

(p) *Ante*, § 94.

(q) Blackstone, *Comm.*, iii, 4.

(r) See C. A. Branson in 28 *Law Quarterly Review* (1912), 262—275, and Pollock, *Torts*, 339, note (p) on *Blades v. Higgs* (1861), 10 C. B. (N.S.) 713; (1865), 11 H. L. C. 621.

party (s). Such exceptions are only apparent because A, § 110.
having lost his right to the property, has got nothing which
he can retake.

(2) *With respect to place.*—There is no doubt that the (2) As to
place.
person entitled to goods may enter and take them from the
land of the first taker if the taker himself wrongfully put them
there (t). But it is by no means certain what the law is when
the goods are on the premises of one who was not responsible
for bringing them there and who has committed no tort with
respect to them. The only comparatively modern case of any
real assistance is *Anthony v. Haney* (u), and even there the
dicta are *obiter* and, although of considerable weight, do not
probe the question of recaption very deeply (a). Tindal, C.J.,
in that case (b) gave as examples of permissible retaking by
A from the land of an innocent person, C, (i) where the goods
have come there by accident; (ii) where they have been
feloniously taken by B and A follows them to C's land;
(iii) where C refuses to deliver up the goods or to make any
answer to A's demand for them.

As to (i) accident, the Chief Justice's examples were A's
fruit falling upon C's land, or A's tree falling upon it by decay
or being blown upon it by the wind. By "accident" it seems
clear that "inevitable accident" (c) was meant. Negligent
or intentional placing of goods on the land of another is a tort,
e.g., where a cricket ball is hit by any ordinary stroke out of
the ground into another person's premises or on to the
highway. The occupier of the premises, far from being put
under any obligation to allow the owner of the goods to enter
and retake them, is entitled to distrain them damage
feasant (d) until the owner of the goods pays for such damage
as they have done. Where, however, the entry of the goods
was inevitable, not only is there no liability for trespass on the

(s) *Ante*, § 109.

(t) *Patrick v. Colerick* (1838), 3 M. & W. 463.

(u) (1832), 8 Bing. 186.

(a) The scraps which are selected from old authorities and cited in this
connexion seem to be either irrelevant or to be contradicted in the very
context in which they occur. *E.g.*, in Y. B. 6 Edw. 4, f. 7, pl. 17 (1466;
"Case of Thorns"), Brian, C.J., and other Judges opposed Catesby's argu-
ment as to the right of recaption. *Millen v. Hawery* (1624), Latch 13, is
also inconclusive. Blackstone, *Comm.*, iii, 45, says almost in the same
breath that the owner can retake his goods "wherever he happens to find
them" and then that "entering on the grounds of a third person is not
allowable except where the goods have been feloniously stolen".

(b) 8 Bing. at pp. 192—193.

(c) *Ante*, § 15.

(d) *Ante*, § 94.

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part of their owner, but the view that he can retake them seems to be right even if there is no direct decision to that effect. It may be hard that the occupier of land should have no right to compensation for harm done by the fall of a large thing, like a tree, on his premises, but his plight is no worse than in any other instance of inevitable accident.

As to (ii), the rule that if A's goods are feloniously taken by B, A may follow them on to C's land, rests upon a passage in Blackstone (e) which commended itself to two of the Judges in *Anthony v. Haney* (f); but nowadays there seems to be no reason for not extending the rule to cases in which B's taking is criminal, but not felonious, e.g., where he has taken A's car for a "joy-ride" and abandoned it in C's field (g).

As to (iii), Tindal, C.J., thought that where C refused to deliver up the goods or to answer A's demand, "a jury might be induced to presume a conversion from such silence, or at any rate the owner might in such case enter and take his property subject to the payment of any damage he might commit" (h). The learned Chief Justice had already dealt with inevitable accident, so that he was presumably contemplating a case in which the presence of A's goods on C's land was due, not to that, but to the tort of A or of someone else for whose act A was in some way or other responsible. If so, it is doubtful whether his *dictum* about A's right to retake the goods is law. Later *dicta* leave it quite uncertain whether A can do so where C's refusal to deliver up the goods amounts to detainment or conversion (i), and they are decidedly against such a view where C's conduct in obstructing A's entry is

(e) Comm., iii, 4—5. His citations of 2 Rolle Rep. 55, 56, 208, and Rolle Abr. 565, 566, are unconvincing. In *Webb v. Beavan* (1844), 6 M. & G. 1055, Tindal, C.J., was of opinion that this was at least arguable as a defence to trespass.

(f) 8 Bing. at pp. 192, 193.

(g) No sensible reason for the distinction here between felonies and other crimes is traceable, except that search for a felon is for the common weal, while search for property taken by trespass (misdemeanour) is merely for one's own benefit: *Higgins v. Andrewes* (1618), 2 Rolle Rep. 55; see, too, Rolle Abr. 565 (Trespass, 2); but retaking of the chattels is not necessarily connected with search for the taker of it.

(h) 8 Bing. 192—193. The report in 1 L. J. C. P. 81, 84, omits the passage about the right to enter, subject to payment of damages; the report in 1 Moo. & Sc. 300, 308, omits any reference to the obligation to pay for the damage done.

(i) If C distrains the goods damage feasant and refuses to return them when A pays for the damage done by them, A can sue replevin, but that throws no light on the question whether he can retake them.

neither; and this, too, even where the goods come on C's premises without any tort on A's part. Thus in *British Economical Lamp Co., Ltd. v. Empire Mile End, Ltd.* (k), C let his theatre to B. B did not pay his rent, so C re-entered and thus terminated the lease. B left in the theatre some detachable electric lamps which he had hired from A. A sued C for detinue of the lamps. It was held that the facts did not show any detinue and it was also said that C had done no wrong by not allowing A to enter and remove them. Note that neither A nor B had committed any tort to C in leaving the lamps there (l). Thus it is not easy to predict what the law is either where the occupier of the land commits detinue or conversion by his refusal or where he is blameless. It may be argued on the one hand that where the owner of goods was under no tortious liability for their appearance on the occupier's land, he ought to be able to retake them in any event provided he does no injury to the premises or gives adequate security for making good any unavoidable injury. On the other hand it may be urged that self-help ought to be strictly limited even against a wrongdoer and forbidden altogether against one who is not a wrongdoer, except that retaking might be permitted in circumstances of inevitable accident or of necessity (e.g., where the goods are perishable or are doing considerable damage to the land and it is impossible to communicate speedily enough with the occupier or his agent).

Tindal, C.J., did not profess to make an exhaustive list of the cases in which recaption is permissible, but be the extent of this justification of trespass and conversion what it may, one thing is clear. The retaker, before he attempts to retake, must, if required to do so, explain to the occupier of the land or the person in possession of the goods the facts upon which his proposed action is based. A mere allegation that the goods are his, without any attempt to show how they came on the premises will not do, for "to allow such a statement to be a justification for entering the soil of another, would be

(k) (1913) 29 T. L. R. 386.

(l) *Ante*, p. 323. Maule, J., in *Wilde v. Waters* (1855), 24 L. J. C. P. 193, 195, thought that if a former tenant of a house left a picture on the wall and the new tenant merely said "I don't want your chattel, but I shall not give myself any trouble about it", that would not be conversion; but this *dictum* is colourless with respect to the old tenant's right to retake the picture, and the same may be said of *dicta* in *Mills v. Brooker*, [1919] 1 K. B. 555, 558, and *Ellis v. Noakes*, [1932] 2 Ch. at p. 104.

§§ 110, 111. opening too wide a door to parties to attempt righting themselves without resorting to law, and would necessarily tend to breach of the peace" (m).

Damages.

§ 111. Measure of damages (n).

In general, the measure of damages in conversion is the value of the thing (o), credit being given to the defendant for the return of the goods converted or of their equivalent (p). But at what moment is the value to be selected? The question is material where the value has fluctuated since the date of conversion of the thing. If it has risen in value, is the plaintiff to benefit by that, or to lose if it has depreciated? The answer to this is doubtful, for the authorities are in a confused state. In *Mercer v. Jones* (q), Lord Ellenborough ruled that in trover for a bill of exchange the damages must be calculated according to the amount of principal and interest due on the bill at the time of conversion; but in *Greening v. Wilkinson* (r), where cotton had risen in value from 6d. per lb. at the moment of conversion to 10½d. per lb. at the trial, Abbott, C.J., ruled that *Mercer v. Jones* was "hardly law", and allowed the jury to find for the plaintiff the value either at the date of conversion or at any later time, in their discretion, "because the plaintiff might have had a good opportunity of selling the goods if they had not been detained" (s). On principle, it seems better to select the moment of conversion as the *punctum temporis* for assessing damages, for the opposite rule would introduce an undesirable element of speculative profit or loss to the parties in an action of this kind (t); but in general

(m) *Tindal*, C.J., in *Anthony v. Haney* (1832), 8 Bing. 186, 191—192.

(n) The topic is fully discussed in Mayne, *Damages* (10th ed 1927), 374—398. See, also, Gahan, *Damages*, 128—133; Arnold, *Damages* (2nd ed 1919), 103—113; Salmond, *Torts*, § 79.

(o) *Finch v. Blount* (1836), 7 C. & P. 478.

(p) *Solloway v. McLaughlin*, [1938] A. C. 247, 257—258.

(q) (1813), 3 Camp. 477.

(r) (1825), 1 C. & P. 625.

(s) The attempted reconciliation of these cases in Mayne, *op. cit.*, 375, is unconvincing.

(t) One might infer from the Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 29 of which allowed a jury to give damages in the nature of interest over and above the value of the goods at the time of the conversion, that the statute favoured this view of the common law, for it looks as if express legislation was necessary to make an exception to it; Mayne, *op. cit.*, 377. S. 29 was repealed by the Law Reform (Miscellaneous Provisions) Act, 1934 (24 & 25 Geo. 5, c. 41), s. 3. Moreover, Maule, J., in *Reid v. Fairbanks* (1853), 13 C. B. 692, 728, regarded *Greening v. Wilkinson* (*supra*) as inconsistent with modern doctrine. Cf. Lord Porter in *Caxton Publishing Co., Ltd. v. Sutherland Publishing Co.*, [1939] A. C. 178, 203.

the moment is that of judgment in the action : *Rosenthal v. Alderton & Sons* and *Sachs v. Miklos* (*ante*, p. 347). The point under discussion must be sharply distinguished from the question of remoteness of damage. We are merely concerned here with the moment at which the damages are to be assessed in money value. What is to be included in the sum as flowing from the consequences of the defendant's wrongful act is quite another matter. Thus, in exceptional circumstances it may extend to extra loss incurred by inability of the plaintiff to deliver goods to a third party to whom he had sold them before the defendant made away with them (*u*).

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Whatever be the time at which damages are to be assessed, it is certain that an increment in the value of the chattel, due to the act of the defendant, is not claimable by the plaintiff; *e.g.*, where the defendant, after committing conversion of the plaintiff's half-built ship, completed her, the plaintiff was not allowed to claim this addition to her value, for the defendant did not by converting the vessel, take upon himself any liability to complete her (*a*). If several acts of conversion have been committed at different dates by the defendant in respect of the same thing, he is responsible for any of them done at any time, and if the value of the thing was greater at one date than at another, he will have to pay the higher value (*b*).

When conversion of a thing bailed is committed by a third person (*i.e.*, one who is neither the bailor nor the bailee), the bailee can recover the full value of the thing from the third party, although he (the bailee) would have a good answer to the bailor if he were sued for the loss of the chattel. Thus, in *The Winkfield* (*c*), mails were lost in a collision between ships one of which was carrying the mails. Now, the Postmaster-General was not liable to the senders of the letters and parcels for their loss. Yet he was held entitled to recover their value from the owners of the ship responsible for the accident. But he was also bound to pay to the bailors any excess above his own interest and this "serves

(*u*) *The Arpad*, [1934] P. 189. Another case is *Re Simms*, [1934] Ch. 1. Cf. Salmond, *Torts*, § 79 (10).

(*a*) *Reid v. Fairbanks* (1853), 13 C. B. 692, 727 (*per* Jervis, C.J.).

(*b*) *Johnson v. Hook* (1883), 31 W. R. 812.

(*c*) [1902] P. 42, overruling *Claridge v. South Staffs Tramway Co.*, [1892] 1 Q. B. 422. See Holdsworth, *Hist. of English Law*, vii, 448 *seq.*, for the history of the matter.

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to soothe a mind disconcerted by the notion that a person who is not himself the complete owner should be entitled to receive back the full value of the chattel converted or destroyed" (d). *The Winkfield* was actually a decision on negligence, but the same point had been settled with respect to conversion in *Swire v. Leach* (e). The principle is not confined to the bailee, but extends to the finder of goods and apparently to any one with a limited interest in them, provided he was in possession at the time of conversion; but not to one who had merely a right to possess at that moment, for that would be inconsistent with the rule that *jus tertii* may be pleaded against him if he sues for conversion (f). Where a bailor has an immediate right to resume possession (e.g., where the bailment is gratuitous), he can recover the full value of the thing. Thus, either bailor or bailee can sue a third party for conversion, though judgment in favour of the one will bar an action by the other (g). But if the bailment is one which excludes the bailor from possession, he cannot sue a third party for conversion during the currency of the bailment, for he has neither possession nor the immediate right to possess (h); he can, however, sue for negligence, if the goods are destroyed or permanently injured by a negligent act which thus damages his reversionary interest (i).

Judgment.

Judgment.—In general, conversion does not deprive the plaintiff of his title to the goods. Therefore, he may get judgment either (i) for the goods or their value; or (ii) for the value of the goods or for damages for their conversion. But whichever of these two judgments he obtains, his title to the goods is not (in the absence of special circumstances) affected, unless and until the judgment is fully satisfied. In *Ellis v. Stenning* (k), A sold Whiteacre to B, reserving uncut timber and the right to cut and remove it. A sold the timber to Ellis. B wrongfully removed some of it and

(d) Collins, M.R., in *The Winkfield*, [1902] P. 42, 60.

(e) (1865), 18 C. B. (N.S.) 479.

(f) *Semble* from *The Winkfield*, [1902] P., at pp. 55–56. It was held in *Blozam v. Hubbard* (1804), 5 East 407, that a co-owner of a ship who had not possession of it at the moment of its conversion could recover only the amount of his own interest.

(g) *Manders v. Williams* (1849), 4 Ex. 339; *Nicolls v. Bastard* (1835), 2 Cr. M. & R. 659; 5 L. J. Ex. 7.

(h) *Gordon v. Harper* (1796), 7 T. R. 9.

(i) *Mears v. L. & S. W. Ry.* (1862), 11 C. B. (N.S.) 850.

(k) [1932] 2 Ch. 81.

Ellis got damages from him for this conversion. Ellis took no steps to make B satisfy the judgment because B was insolvent. B sold the timber to Stebbing. Ellis sued Stebbing for conversion. It was held that Stebbing was liable, for the judgment against B had never been satisfied. \$ 222.

CHAPTER XV

DECEIT

§ 112. Deceit is a false statement of fact made by A knowingly or recklessly (i.e., not caring whether it be true or false) with intent that it shall be acted upon by B, who does act upon it and thereby suffers damage.

Deceit in this sense originated as an independent tort in *Pasley v. Freeman* (1789) (a). There was an old writ of deceit known as early as 1201, which had a much narrower scope, for it lay only against a person who had used legal procedure for the purpose of swindling some one (b), as where Adam, desiring to levy a fine of land belonging to his wife, Christiana, produced in Court for that purpose a woman who was not Christiana, and, on his wife's claim of £100 damages for this deceit, Adam was sent to gaol (c). As time went on, the remedy widened in the direction of what we should now call breach of contract. Fitzherbert, writing in 1534, said, "This writ lieth properly where one man doth anything in the name of another, by which the other person is damnified and deceived" (d). Now the Courts had long been trying to enlarge the sphere of remedies for breach of contract, and they had effected this by writs of trespass on the case, writs of deceit and writs of deceit upon the case, and there was, as with so many of our writs, a not very clear line between these different remedies (e). One thing, however, is fairly certain. Although the writ of deceit was applied in the law of contract, no experiment worth the name was made in extending it to pure tort (other than abuse of legal procedure) until *Pasley v. Freeman* (f). In that case

(a) 3 T. R. 51 (W. Cases, 146).

(b) Winfield, *Hist. of Conspiracy* (1921), 33.

(c) Pollock & Maitland, *Hist. of English Law*, ii, 535, note 2.

(d) *Natura Brevium* (9th ed. 1794), 95 E.

(e) Cf. *op. cit.* 98 K. (deceit) with 94 C (trespass upon the case).

(f) *Supra*. In Fitzherbert, N. B., 95—100, there are many examples of writs of deceit for abuse of procedure and a few of such writs for breach of contract, but only one (96 C) for fraudulent conduct falling outside these classes. Of course in this period there was no real procedural demarcation between contract and tort, because *assumpsit* (the chief remedy on contract) was delictal in origin, and it is in this sense that one may legitimately speak of the action of deceit upon the case as "sounding in tort"; Holdsworth, *H. E. L.*, iii, 407—408, 429, *seq.* (the cases cited by the learned author are,

the defendant had assured the plaintiffs that X could safely be given credit for some £2,600, the price of sixteen bags of cochincal which X was buying from the plaintiffs. The defendant's assurance was false and he knew it was. The plaintiffs sued in tort for deceit, and by a majority of three to one the Court gave judgment in their favour. §§ 112, 113.

Very frequently fraudulent conduct is implicated with contract and the reports furnish far more instances of actions for fraud in connexion with that than of actions for deceit, pure and simple; but the requisites for a successful allegation of fraud in contract are the same as for the tort of deceit, except that in contract it is not necessary to prove damages,

Whether it be deceit in tort or fraud in contract, the law does not exact such a high standard of honesty as a moralist might demand. We are not speaking here of statements that are conventional evasions of the truth, like the "Not at home" of a mistress of a house, or the shopkeeper's "We are just out of it"; nor of statements that answer the fool according to his folly, as where one's opinion is asked of a man's *fiancée* or of his new car; nor of encouragement that is *splendide mendax*, like the doctor's "bedside manner". Nobody but an ethical pedant would stigmatise these as lies. But, apart from this, the law is less strict than even an average moralist would be, and wisely so, for it is a serious thing to brand a man in public as dishonest, and that is the necessary effect of a successful action for fraud or deceit; and so the burden of proof is a heavy one.

What is not deceit.

We can now examine the essentials of the tort.

§ 113. *A false statement of fact.*—The comment here is chiefly upon what the law reckons as "fact". Statement of fact.

Silent representations.—The statement may, of course, be oral or written, but there is some doubt whether it includes representations which are neither oral nor written. On principle, it ought to do so. What difference is there between getting goods from an Oxford tradesman by falsely asserting that one is a commoner of Magdalen College and simply by wearing a commoner's cap and gown? There is none in Representations.

I think, on what would now be called breach of contract). The Court in *Pasley v. Freeman* were convinced that they were creating a new tort. In fact, it was the novelty of it that frightened Grose, J. (a very conservative judge) into dissent.

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criminal law (g). Much less should there be any in the lighter liability of tort. Yet there is no decision directly in point, although there are *dicta* not unfavourable to this view. In *Bodger v. Nicholls* (h) the defendant sold a diseased cow at market to the plaintiff who sued him for deceit. It was held that there was not sufficient evidence that the defendant knew of the disease to let the case go to the jury, so the defendant was successful on that ground; but in an *obiter dictum*, Blackburn, J., had no doubt that the mere taking of the cow to a public market was a representation that it was free from infectious disease, and that "to say otherwise would be to run counter to the common sense of mankind" (i). Later *dicta* in the House of Lords in *Ward v. Hobbs* (k) touched upon the matter. Lord Cairns, L.C., reserved his opinion on the view that the mere sending of diseased cattle to market was an implied representation that they were sound, but he certainly did not cast any doubt on the general proposition that representations may possibly take the form of tacit conduct (l); and Lord O'Hagan said that "no doubt conduct may amount to representation as clearly as any form of words" (m).

Promises.

Promises.—It is commonly said that mere promises are not statements of fact, but this is apt to be misleading. A promise is really a statement of fact, for it is a statement of a present intention as to the future. It would be more accurate to say that if I make a promise believing that I shall fulfil it, the reason why I cannot be liable for deceit if I do not fulfil it, is not because my promise is not "a statement of fact", but simply because I believe the statement of my present intention to be true when I made it, and that if I had no such belief I am liable for deceit if I break the promise. If I

(g) *R. v. Barnard* (1837), 7 C. & P. 784.

(h) (1873), 28 L. T. 441.

(i) *Ibid.*, 445.

(k) (1878), 4 App. Cas. 13.

(l) *Ibid.*, 22.

(m) 4 App. Cas. 26. Other cases cited in this connexion do not seem to be helpful: e.g., *Horsfall v. Thomas* (1862), 1 H. & C. 90, 99 (plug of metal in defective cannon held, on the facts, not to be a representation); *Patterson v. Landsberg* (1905), 7 F. 675 (*obiter dictum* in a Scottish case in favour of the view); *Schneider v. Heath* (1813), 3 Camp. 506 (oral statements as well as acts); *Marnham v. Weaver* (1899), 80 L. T. 142 (probably oral statements accompanied the conduct here); *Langridge v. Levy* (1837), 2 M. & W. 519; 4 M. & W. 337 (oral statements); *Mullett v. Mason* (1866), L. R. 1 C. P., at p. 562 (*dictum* of Willes, J., really refers to remoteness of consequence). Cf. Clerk & Lindsell, *Torts*, 670 seq.; Salmond, *Torts*, § 150 (2).

order goods, honestly believing that I shall pay for them in the future, that is not deceit even if, when the time comes for payment, I cannot make it, although I am no doubt liable for breach of contract. But if, when I ordered the goods, I did not believe that I should pay for them, that is deceit if a statement to the effect that I would pay for them were made or implied at the time, and there is some indication in the reports that such a statement, even if it is not expressed, is always implied (n). It seems senseless to say that in the first case I have made a "mere promise" which is not a "statement of fact". It is just as much a promise and a statement of fact (for my intention is always a state of fact whether it relate to the present or to the future) as in the second case. The real difference between the two cases is that in the first I believe what I say or imply and in the second I do not. Perhaps this is in fact what the legal theory is, but its terminology about "promise" and "intention" is so vague that one can only infer its meaning (o).

Intention.—A statement of intention is, as has just been indicated, a statement of fact. For deceit "there must be a misstatement of an existing fact: but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else". So Bowen, L.J., in *Edgington v. Fitzmaurice* (p), where directors of a company were held liable for deceit in procuring the public to subscribe for debentures by falsely stating in a prospectus that the loan secured by the debentures was for the purpose of completing buildings of the company, purchasing horses and vans and developing the trade of the company; in fact the directors intended to use it for paying off pressing liabilities.

There is one exception to the rule that a deliberate misstatement of intention is fraudulent. As between vendor and purchaser, a misstatement by the purchaser of the highest price which he is prepared to give, or by the vendor of the

(n) Mellish, L.J., in *Ex p. Whittaker* (1875), 10 Ch. 446, 449—450; Bigham, J., in *Re Eastgate*, [1905] 1 K. B. 465, 467; cited by the editors of Clerk & Lindsell, Torts, 667, note (k), who represent the law as settled to this effect.

(o) Cf. *Beyers v. Green*, [1936] 1 A. E. R. 613. The distinction between "intention", "promise" and "statement of fact" is usually completely ignored.

(p) (1885), 29 Ch. D. 459, 483.

§ 113. lowest price which he is willing to take, will not ground an action for deceit (q). The reason for this is that it is so customary for persons standing in that relation to tell lies of that description that no reasonable person ought ever to be deceived by them and that it is a man's own fault if he is. The exception has been pressed so far that it has been held that if I induce you to sell property to me by falsely asserting that prospective partners of mine will not allow me to give more than £4,500, whereas they are, to my knowledge, willing to pay about £5,300, no action in deceit will lie against me (r). But none of the reasons given for this decision was satisfactory and it is now regarded as of little weight (s). In affirming the decision in the Exchequer Chamber, Mansfield, C.J., implied that a prospective buyer or seller may tell every falsehood that he can in order to get a bargain struck (t). But this goes a great deal too far, for there may well be circumstances which will make such a falsehood fraudulent in law; e.g., if the seller expressly told the buyer that he relied upon his good faith and accuracy in stating the value of property with which the buyer was fully acquainted but of which the seller (having inherited it and never seen it) knew nothing (u).

Opinion.

Opinion.—An expression of opinion is generally understood to be a statement of belief that a fact has existed, or exists now, or will occur in the future. Now the man who puts forward this belief usually has in mind some facts upon which he bases his belief, and his belief in those facts or in his inference from them may be honest or it may be non-existent. If it is honest as to both facts and inference, he cannot, if he states it, be liable in deceit however mistaken he may have been as to the one or the other. If, however, he knowingly or recklessly misstates the facts upon which his belief is founded, he may be liable for deceit, unless they are notorious or are known by the other party just as much as by himself. Thus it is not deceit if one states that he believes York to be the largest city in the world when he knows that it is not; nor would it make any difference if he said that he knew it to be the largest city in the world, being well aware that it is not.

Here, as elsewhere, attention must be paid to the context

(q) Rolle Abr. 101, pl. 16 (A.D. 1598).

(r) *Vernon v. Keys* (or *Keyes*) (1810), 12 East 632; (1812), 4 Taunt. 488.

(s) Sir F. Pollock in 11 R. R. Pref., vi—vii, and Torts, 226, note (q).

(t) 4 Taunt., at p. 493.

(u) *Haygarth v. Wearing* (1871), L. R. 12 Eq. 320, 327—328.

in which the word “know” is used, for in particular circumstances it may be equivalent to mere belief. If, in giving the character of a servant, I say that he is “clean and sober” that means only that, so far as my observation goes, I believe him to be clean and sober; and perhaps this is so even if I say that I *know* he is clean and sober, for any prospective employer would not expect me to be speaking to anything more than my observation of his conduct, and so long as my statement of my belief or my “knowledge” is honest, there is no deceit even if the servant be dirty or drunken. But this falls far short of the decision in *Haycraft v. Creasy* (a), where the plaintiff asked the defendant whether X might safely be given credit, and the defendant replied that he might and added that he spoke this from his own knowledge and not from hearsay. In fact he had no such knowledge, although he had strong reason for believing that X might safely be given credit. A majority of the Court held that this was not deceit, but a distinguished authority has suggested that nowadays the dissenting judgment of Lord Kenyon, C.J. (who regarded the case as indistinguishable from *Pasley v. Freeman* (b)), is probably to be preferred (c). A man’s solvency at any particular moment is capable of much more accurate knowledge (and therefore of exact statement) than his real tendencies to cleanliness or sobriety.

Statements of law.—Is a false statement of law a “statement of fact” for the purposes of deceit? It is certainly so if the statement is an inference from a particular rule, or particular rules of law. In *West London Commercial Bank v. Kitson* (d), directors of a company, knowing that the private Act of Parliament which incorporated the company gave them no legal power to accept bills of exchange, nevertheless represented to the plaintiff that they had such authority and he thereby suffered damage. They were held liable to him. Bowen, L.J., said: “Suppose I were to say I have a private Act of Parliament which gives me power to do so and so, is not that an assertion that I have such an Act of Parliament? It appears to me to be as much a representation of a matter of fact as if I had said I have a particular bound copy of

Statements
of law.

(a) (1801), 2 East 92.

(b) (1789), 3 T. R. 51.

(c) Pollock, *Torts*, 226, note (m).

(d) (1884), 13 Q. B. D. 360.

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'Johnson's Dictionary' (e). Indeed, many statements of fact involve inferences from legal rules. "If you state that a man is in possession of an estate of £10,000 a year, the notion of possession is a legal notion and involves knowledge of law" (f).

But if what is stated is a pure proposition of law, one hesitates to say whether or not this is a statement of fact. A misstatement founded on a mutual innocent mistake of law was held to be no foundation for relief in Chancery in *Eaglesfield v. Marquis of Londonderry* (g), and the like result was reached where there was innocent misrepresentation of law in *Beattie v. Lord Ebury* (h), although possibly it might have been otherwise if the person misled had not had knowledge and intelligence equal to that of the defendant (i). One may infer, then, that if there were not such equality there would be a remedy in Equity, and *British Workman's, etc., Co., Ltd. v. Cunliffe* indicates that there is probably a remedy at Common Law (k). But none of these decisions is on fraudulent misrepresentation of the law, nor does one appear to be traceable in the reports.

As a matter of general principle and also as a probable inference from the cases noted above, a deliberate misstatement of law ought to be deceit provided the other requisites of the tort are satisfied, and provided that the parties are not on an equal footing with respect to knowledge of the law or to general intelligence. If, as seems likely, there are remedies in Equity and at Common Law for innocent misrepresentation of law where this equality does not exist, a *fortiori* there ought to be an action for deceit where the representation is fraudulent (l). The question whether an equality of knowledge and intelligence exists ought, it is suggested, to be regarded as one of fact to be determined on the facts of each particular case. Thus, professional lawyers dealing with each other at arm's length would doubtless be deemed equals, and if one falsely alleged to the other something purporting to be

(c) *Ibid.*, 363.

(f) Jessel. M.R., in *Eaglesfield v. Marquis of Londonderry* (1876). 4 Ch. D. 693, 703.

(g) (1876), 4 Ch. D. 693.

(h) (1872), 7 Ch. 777.

(i) Page Wood, V.-C., in *Rashdall v. Ford* (1866), L. R. 2 Eq. 750, 755.

(k) (1902), 18 T. L. R. 425, 502 (misstatement by an insurance agent as insurance is a contract *uberrimæ fidei*, the case is not a very strong one for our purpose).

(l) Bowen, L.J., in *West London Commercial Bank v. Kitson* (1884), 13 Q. B. D., at pp. 362-363, seemed inclined to think that Equity would

a pure proposition of law, this could scarcely ground an action for deceit. But if a solicitor did the same thing to his lay client, he ought to be liable (*m*). It is not easy to see what argument can be produced the other way. To urge that every one is presumed to know the law is to carry into the law of deceit a distinction between law and fact which, artificial enough in any event, was never invented for the purpose of shielding swindlers..*

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Silence.—Some sort of statement or representation there must be, but a probable qualification of this is that, where a man is under a legal duty to speak and deliberately holds his tongue with the intention of inducing the other party to act upon the belief that he did not speak because he had nothing to say, that is fraud (*n*). What constitutes such a duty is a matter of law. It often arises under a contract, and most of the decisions on innocent misrepresentation by reason of such silence, and most of the *dicta* on fraudulent misrepresentation from the same cause, are on contract (*o*). But the duty may arise in other ways and, whatever its origin may be, there is no reason to think that breach of it cannot be deceit if the other essentials of that tort are present. Moreover, *suppressio veri* may amount to *suggestio falsi* if it is "such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false" (*p*); *e.g.*, where a woman has been guilty of unchaste conduct with one man before her engagement to another from whom she deliberately conceals this fact, for it is a matter which goes to the very root of the contract and its silent suppression will release him from his promise to marry her (*q*) and will presumably give him an action for deceit if he has acted upon it and thereby suffered damage: and perhaps the same applies where a woman in her contract of employment

Silence.

not allow one who wilfully misrepresented the law to retain any benefit acquired thereby.

(*m*) He is apparently liable for negligent misstatement to his client, *Banbury v. Bank of Montreal*, [1918] A. C. 626, 707.

(*n*) Lord Blackburn in *Brownlie v. Campbell* (1880), 5 App. Cas. 925, 950. Cf. H. G. Hanbury, *Equity* (4th ed.), 670.

(*o*) Kerr, *Fraud and Mistake* (6th ed. 1929), 76 *seq.*

(*p*) Lord Cairns in *Peck v. Gurney* (1873), L. R. 6 H. L. 377, 403; so, too, Lord Chelmsford, *ibid.*, 392; and James, L.J., in *Arkwright v. Newbold* (1881), 17 Ch. D. 301, 317—318. See, too, MacKinnon, J., in *Legh v. Legh* (1930), 143 L. T. 151, 152.

(*q*) *Per* Cockburn, C.J., in *Beachey v. Brown* (1860), E. B. & E. 796, 802—803.

§ 113.

Statements
which prove
to be false.

as a governess describes herself, with intent to deceive, as a "spinster" when in fact she has been divorced by her former husband (r).

What is the position of A who makes a true statement to B and then discovers, before B acts upon it, that it has become false? Does the law permit A to remain silent or does it compel him to correct B's false impression under pain of an action of deceit? In *Incedon v. Watson* (s), a *nisi prius* case in which A, in negotiating for the sale of the goodwill of a school to B, told him truly that there were twenty-two boarders and, before the bargain was concluded, found that the boarders had dropped to seventeen and said nothing of this to B, Wightman, J., directed the jury that if this were proved it was deceit. Moreover, in *Traill v. Baring* (t), concealment of this kind was held to be ground for cancellation in Equity of a policy of life assurance. There were later *dicta* in which the possibility of a Common Law action for deceit was regarded as still an open question (u); but in *With v. O'Flanagan* (a), Lord Wright, M.R., *obiter* appeared to regard it as feasible, and in *Bradford Building Society v. Borders* (b), he expressed an opinion to the like effect in the House of Lords and he added that "any person who, though not a party to the fraudulent original representation, afterwards learns of it and deliberately and knowingly uses the delusion created by the fraud in the injured party's mind", would also be liable (c).

Closely akin to this is another problem. Suppose that A's statement was false from the very beginning, but that when he made it he honestly believed it to be true and then discovers later and before B has acted upon it that it is false. Must he acquaint B with this? Here, again, Equity has a decided answer, whereas the Common Law is short of any direct decision. In *Reynell v. Sprye* (d) a deed was cancelled by the Court of Chancery because A had not communicated

(r) *Fletcher v. Krell* (1872), 42 L. J. Q. B. 55; no fraud was alleged, so the contract held good.

(s) (1862), 2 F. & F. 511.

(t) (1864), 4 De G. J. & S. 318, 329.

(u) Cotton, L.J., in *Arkwright v. Newbold* (1881), 17 Ch. D. 301, 325; James, L.J., *ibid.* 329, seemed to incline against the possibility.

(a) [1936] Ch. 575, 584.

(b) [1941] 2 A. E. R. 205, 220.

(c) Lord Porter found it unnecessary to express an opinion on either point; *ibid.*, 228—229.

(d) (1852), 1 De G. M. & G. 660, 708—709.

the falsity of his belief (e). As to the wider liability to an action of deceit, it might be inferred from a *dictum* of Lord Blackburn that it exists (f).

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However we treat the question, there is no substantial difference between the two problems just put, and the weight of the leading text-books is decidedly in favour of the view that A is guilty of deceit in both of them if he withholds from B the further information (g). There is much to be said for the view, but I doubt whether all its consequences have been considered. It certainly ought to be the law where there is plenty of time to retract the statement and where the result of not doing so is certain to result in widespread loss or damage (as in the case of a company prospectus) or in physical danger or serious business loss to even one person. But other cases are imaginable which even a moralist might shrink from describing as fraudulent. Suppose that B has booked (but not paid for) an unreserved seat on A's char-à-banc at 9 a.m., and that A tells him correctly that he intends to start the journey at 11 a.m. Suppose that A, finding that the vehicle is full by 10.30, starts then without informing B of his change of plans, because it would take nearly half an hour to find B. Here, A has certainly committed a breach of contract, but it seems harsh to style his wrongful silence as to the changed circumstances deceit, even though it is admittedly intentional. It is really no more than a churlish indifference to a breach of contract. If it is to be reckoned as a tort, one might suggest that a better way of dealing with it would be by an extension of one or other of two principles: (i) the principle that intentional physical harm inflicted upon another person is tortious (§ 68, *ante*); the harm which B might sustain here would not necessarily be physical, but that does not appear to be a substantial difference; (ii) the principle of *Nocton v. Lord Ashburton* (h) which is examined in detail in the next section; true, it is a doctrine of Equity but its general good sense is such that it might well be adopted by the Common Law even if the Common Law has to find a new name for it.

One more possible case of silence raises no difficulty. If

(e) See, too, Jessel, M.R., in *Redgrave v. Hurd* (1881), 20 Ch. D. 1, 12—13.

(f) *Brownlie v. Campbell* (1880), 5 App. Cas. 925, 950.

(g) Pollock, Torts, 230—231. Salmond, Torts, § 150 (3). Clerk & Lindsell, Torts, 678 (but they admit the first case to be doubtful).

(h) [1914] A. C. 932.

§§ 113, 114. A knowingly makes a false statement to B, but before B acts upon it subsequent events have turned the statement into a true one, this is not deceit. Thus in *Ship v. Crosskill* (i), a false allegation in a prospectus, that applications for more than half the capital of the company had been subscribed, had become true before the plaintiff made his application for shares, and it was held that there was no misrepresentation for which relief could be given to him.

Knowledge
or reckless-
ness.

§ 114. *The statement must be made with knowledge of its falsity, or recklessly.*—We can dispose of “recklessly” very briefly. The term is somewhat unfortunate because it might give the impression that recklessness signifies “gross negligence”. That is not so in this context, whatever may be the usage in criminal law. What it does mean is not knowing whether the statement is true or false and being consciously indifferent whether it is one or the other. This is something much more than “gross negligence”. It is really intention, for the consequences of the act are adverted to and are desired (k).

Rule in
Derry v.
Peek.

“Knowledge” is a plain enough word, but until the leading case of *Derry v. Peek* in 1889 (l), it had become entangled to some extent with mere carelessness of statement, and it took a decision of the House of Lords to make it clear that blundering but honest belief in an allegation cannot be deceit. The facts were that the directors of a tramway company issued a prospectus in which they stated that they had Parliamentary powers to use steam in propelling their trams. In fact the grant of such powers was subject to the consent of the Board of Trade. The directors honestly but mistakenly believed the giving of this consent to be a merely formal matter. It was, however, refused. The company was wound up in consequence and the plaintiff, who had bought shares in it on the faith of the prospectus, instituted an action for deceit against the directors. The House of Lords, reversing the decision of the Court of Appeal, gave judgment for the defendants. They held that a false statement made carelessly and without reasonable ground for believing it to be true could

(i) (1870). L. R. 10 Eq. 73.

(k) The matter is best handled by Bowen, J.J., in *Angus v. Clifford*, [1891] 2 Ch. 449, 471. See, too, Lord Herschell in *Derry v. Peek* (1889), 14 App. Cas. 337, 371.

(l) 14 App. Cas. 337 (W. Cases 148).

not be fraud, although it might furnish evidence of it. Earlier decisions in Equity gave some foundation for the impression that there was a difference between "legal fraud" and "equitable fraud"; at any rate relief could be obtained in the Court of Chancery for some acts bordering on sharp practice which were not regarded as deceit in a Common Law Court. This difference was negated by *Derry v. Peek*, but we shall have to say more of this when we consider *Nocton v. Lord Ashburton* (m).

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There has been a great deal of adverse criticism of *Derry v. Peek* by distinguished lawyers (n) although it has been approved in some quarters (o). The hostility to it has evinced itself in two lines of attack which are entirely different. It is urged (i) that the decision was wrong and that the defendants ought to have been held liable for deceit; (ii) that the decision was right, but that English law is in a deplorable state if the plaintiff had no remedy.

Criticism of
Derry v.
Peek.

As to the first criticism, I think that it is ill-founded, that the decision of the House of Lords was good law and good sense, and that if it had been otherwise it would have been one more example of hard cases making bad law. When all is said and done, the fact remains that negligence in making a statement, however culpable it may be or however disastrous in its consequences, is not fraud. A careless man is not a dishonest man and no amount of argument will prove that he is one. That was all that *Derry v. Peek* decided.

But the second criticism is a just one and, as we shall see, Parliament was so much impressed by the hard plight of people like the plaintiff that it made a statutory exception, albeit a very limited one, to the rule in *Derry v. Peek*. Apart from that exception and others which will be considered in their place, the question remains, "Why does not the law regard carelessness in statement as a tort? Why does it not fall within the ordinary tort of negligence?" The requisites of that tort are first, a legal duty to take care; secondly, breach of it by the defendant; and thirdly, consequent damage to the plaintiff. What, then, is there to exclude negligent statements from any other kind of negligent conduct?

Now a point which is apt to be overlooked is that it cannot

Is a careless
statement
negligence?

(m) [1914] A. C. 932, *post*, p. 389.

(n) *E.g.*, Sir Frederick Pollock, *Torts*, 228—230.

(o) *E.g.*, Sir William Anson in 6 *Law Quarterly Review* (1890), 72—74.

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be certainly stated that an action for negligence will not lie. Right up to the time of the decision in *Derry v. Peek*, this was somewhat doubtful, for although the Court of Appeal in *Dickson v. Reuter's Telegram Co.* (p) held that it would not lie, yet Chitty, J., in *Cann v. Willson* (q) had held that it would, and he gave judgment against a professional valuer who had carelessly over-valued some property for the purpose of a mortgage. Nor did *Derry v. Peek* itself affect the law on this point one way or the other, for it was a decision on the tort of deceit and not on the tort of negligence, and one can only speculate what the House of Lords would have done if the plaintiff had sued for negligence instead of deceit.

Later decisions and dicta have brought out two points. First, the Court of Appeal appears to be definitely against the existence of any action in tort for negligent statement. Not only did it overrule *Cann v. Willson* in *Le Lievre v. Gould* (r), but members of it have in other cases emitted the opinion that this was the effect of *Derry v. Peek* (s). Secondly, the House of Lords have in fact never passed upon the point. It is still possible for them to do so, and to hold that a negligent statement may be a tort. But one would hesitate to say that it is probable that they would. It is true that there is nothing in their own decision in *Derry v. Peek* to prevent them from taking this course; it is true, again, that their decision in *Donoghue v. Stevenson* (t) has widened the scope of negligence as a tort; but, on the other hand, even the majority Lords in that case showed not the slightest disposition to overrule *Le Lievre v. Gould*, and although the question of negligent statement was not before the House and *Le Lievre's Case* was therefore not directly in point, one feels that what may be called "the judicial atmosphere" is unfavourable to the success of such an action. There is no doubt that carelessness in putting in circulation deleterious food, clothing or other articles will ground an action in tort for negligence by the

(p) (1877), 3 C. P. D. 1.

(q) (1858), 39 Ch. D. 39.

(r) [1893] 1 Q. B. 491.

(s) Bowen, L.J., in *Angus v. Chifford*, [1891] 2 Ch. 449, 470; Lindley, L.J., *ibid.*, 461, and in *Bishop v. Balkis Consolidated Co., Ltd.* (1890), 25 Q. B. D. 512, 521. Bowen, L.J., in *Le Lievre v. Gould*, [1893] 1 Q. B. 491, 501. Followed by Wrottesley, J., in *Old Gate Estates, Ltd. v. Topliss*, [1939] 3 A. E. R. 209.

(t) [1932] A. C. 562.

person injured against the manufacturer (u). How, then, is putting in circulation a negligent statement to be distinguished from this, if we assume for the moment that no action will lie for it? No satisfactory reason has ever been given for the difference. In *Le Lievre v. Gould*, the Court of Appeal gave some unsatisfactory ones (a), and even Bowen, L.J., could put it upon no higher ground than that the law "does not consider that what a man writes on paper is like a gun or other dangerous instrument" (b). What it comes to, then, is this. In cases of this type, unless the House of Lords should in future hold otherwise, the doctrine of negligence as a tort applies to careless representations only in circumstances where the defendant has control of dangerous chattels or dangerous property, like defective scaffolding (c), a mischievous hair-wash (d), ginger-beer polluted by dead snails (e), or poisonous underclothing (f).

If that correctly sums up the situation, the law is in a regrettable state. More than a generation ago a distinguished American lawyer pointed out its illogicality (g). Why, he asked, should A be liable to B (as he undoubtedly is) for carelessly flourishing his pen about and thus scratching B's face with it, and yet not liable if, with the same pen, he carelessly writes a false statement, intending B to act upon it, and B thereby suffers financial ruin? Suppose that a cartographer carelessly omits from an official map a sunken reef and that a ship is consequently wrecked; or that the author of a scientific book on snakes carelessly states that a newly-discovered snake is harmless when in fact it is poisonous and an explorer, relying on this statement, is bitten while he is handling one and dies; or that a qualified analyst publishes a careless statement that a particular patent medicine is as harmless as bread, when in fact there is a mild poison in it and a person relying upon the statement is poisoned by taking large quantities of the medicine. It is hard that there should

(u) *Donoghue v. Stevenson*, [1932] A. C. 562; *Grant v. Australian Knitting Mills, Ltd.*, [1936] A. C. 85.

(a) Lord Esher, M.R., [1893] 1 Q. B., at pp. 497—498; A. L. Smith, L.J., at p. 504.

(b) [1893] 1 Q. B. 502; *Humphery v. Bowers* (1929), 34 Com. Cas. 189.

(c) *Heaven v. Pender* (1883), 11 Q. B. D. 503.

(d) *George v. Sherington* (1869), L. R. 5 Ex. 1.

(e) *Donoghue v. Stevenson*, [1932] A. C. 562.

(f) *Grant v. Australian Knitting Mills, Ltd.*, [1936] A. C. 85.

(g) Jeremiah Smith in 14 *Harvard Law Review* (1900), 184; reprinted in *Selected Essays in the Law of Torts* (1925), 325—340.

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be no remedy in tort in any of these cases and yet it is very doubtful whether there would be any, for even if these things be "dangerous", can it be said that he who makes the careless statement has any "control" over them?

In America the New York Court of Appeals in 1927 repudiated the idea that there is in general no remedy in tort for negligent misstatement (*h*), and the *Restatement of the Law of Torts* (which, although not authoritative, represents the highest common factor of case law in the various States) imposes liability in such circumstances (*i*).

Qualifications
of *Derry v.*
Peek.

Qualifications of the rule in Derry v. Peek.—The decision in *Derry v. Peek* was not a charter of immunity for every slovenly statement that a man may make and the following qualifications must be noted.

(i) Statute.

(i) *By statute.*—Not unnaturally the decision bore hardly upon the small investor who has neither the shrewdness nor the information to appreciate much of a company prospectus except the probability of profit to himself expressed or implied therein. In the very next year, the Directors Liability Act, 1890 (*j*), provided for his protection, and that Act is now embodied in the Companies Act, 1929 (*k*), and the Companies Act, 1947 (*l*). The gist of it is that a director or promoter of a company is liable to pay compensation (*ll*) to any subscriber for shares or debentures on the faith of a prospectus by reason of any untrue statement in it, unless he can prove (i) that he had withdrawn his consent to be a director before issue of the prospectus, or (ii) that it was issued without his knowledge or consent and that, when he became aware of its issue, he gave reasonable public notice of his repudiation, or (iii) that he had reasonable ground for belief in the untrue statement and did believe it up to the time of allotment of the shares or debentures, or that he had repeated the statement of an expert and had reasonable ground to believe and did, up to the time of the issue of the prospectus, believe that the expert (i) was competent to make the statement, and (ii) had not withdrawn his consent to the issue of the prospectus before delivery of a

(h) *International Products Co. v. Eric R. R. Co.* (1927), 244 N. Y. 331. See Goodhart, *Essays in Jurisprudence* (1931), 277—279.

(i) §§ 311, 552.

(j) 53 & 54 Vict. c. 61.

(k) 19 & 20 Geo. 5, c. 23, s. 37.

(l) 10 & 11 Geo. 6, c. 47, s. 65.

(ll) The measure of damages is the same as in a common law action for deceit: *Clark v. Urquhart*, [1930] A. C. 28.

copy of the prospectus for registration or, to the defendant's knowledge, before allotment of shares thereunder (*m*).

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There are other statutory qualifications which need not detain us here (*n*).

(ii) *Estoppel*.—As has already been stated, estoppel is a rule of evidence which precludes a person from denying the existence of facts in the truth of which he has led another person to believe, who suffers damage by acting upon the representation. With the details of it we are not concerned (*o*).

(ii) Estoppel.

(iii) *Where there is a contractual duty to take care in making the statement*.—This is merely a reminder that liability may exist quite independently of tort.

(iii) Contract.

(iv) *Representations relating to dangerous property*.—This qualification to which passing reference was made above will be considered at length in Chapters XXI, XXII.

(iv) Dangerous property.

(v) *Implied warranty of authority in agency*.—If A contracts with C as agent on behalf of B who has given him no authority to do so, but A honestly believes that he has, then C can sue A for breach of implied warranty of authority (*p*).

(v) Implied warranty, etc.

(vi) *Compensation in Equity*.—*Derry v. Peek* is commonly supposed to have annihilated the distinction between "legal fraud" and "equitable fraud", or, to put it in another way, there is no difference in the conception of fraud in a Court of law whether that Court be a Common Law one or the Chancery Division. No doubt this is correct, although at least one learned author has pleaded for the retention of the terms (*q*). He points out that *Derry v. Peek* is apt to obscure the rule, which was untouched by the Judicature Act and which was emphasised by the House of Lords in *Nocton v. Lord*

(vi) Equity.

(*m*) Act of 1947, s. 65 (3).

(*n*) See *Dawson & Co. v. Bingley U. D. C.*, [1911] 2 K. B. 149. The qualification seemingly includes the liability of a medical practitioner who makes negligent statements in a certificate that another person is a lunatic. In *De Freville v. Dill* (1927), 96 L. J. K. B. 1056, McCardie, J., held that a duty to take reasonable care in giving such a certificate is cast upon the practitioner. This duty is apparently referable to the Lunacy Act, 1890 (53 & 54 Vict. c. 5), and the inference that this is so emerges more clearly in earlier decisions: *Hall v. Semple* (1862), 3 F. & F. 33 (earlier statutes); *Everett v. Griffiths*, [1921] 1 A. C. 631; *Harnett v. Fisher*, [1927] 1 K. B. 402; [1927] A. C. 573 (note that the H. L., in holding in this last case that there was a duty at Common Law to take care, were referring to examination of the alleged lunatic, not to giving the certificate; [1927] A. C. at pp. 579—580).

(*o*) See *Everest & Strode*, *Estoppel* (3rd ed. 1923), Index, "Fraud".

(*p*) Discordant views have been expressed as to the principle of the remedy: *Winfield, Province of Tort* (1931), 177—178.

(*q*) Dr. E. C. S. Wade in *Cambridge Legal Essays* (1926), 295—314.

§§ 114—116. *Ashburton* (r), that Equity has in certain circumstances an exclusive jurisdiction in giving a remedy for conduct which it has styled "fraud" although no fraudulent intent need be proved and although such conduct is not actionable in a Common Law Court. Perhaps it would be safer nowadays to describe such conduct, not as "equitable fraud" but by the periphrasis "breach of a fiduciary obligation". The remedy, in any event, is for compensation, not for damages, and is obtainable only where the principle of *restitutio in integrum* applies (s). In *Nocton v. Lord Ashburton*, a solicitor negligently, but without fraud, induced his client to release part of a mortgage security, so that the security became insufficient and the client suffered loss. He sued the solicitor who, being in a fiduciary position to him, was held liable to compensate him (t).

Intent.

§ 115. *The intent.*—The statement must be made with intent that the plaintiff shall act upon it. So long as that is satisfied, it need not be made to him either literally or in particular. In *Langridge v. Levy* (u), the seller of a defective gun which he had falsely and knowingly warranted to be sound, was held liable to the plaintiff who was injured by its bursting, although it was the plaintiff's father to whom the gun had been sold, but who had acquainted the seller with the fact that he intended his sons to use it. If, however, the statement is made to a limited class of persons, no one outside that class can sue upon it. Thus a company prospectus is ordinarily confined in its scope to the original shareholders. For false statements in it they can sue, but purchasers of the shares from them cannot do so (a); but circumstances may quite possibly make the prospectus fraudulent with respect even to them, as where it is supplemented by further lying statements intended to make persons who are not original allottees of the shares buy them in the market (b).

Reliance on statement.

§ 116. *The plaintiff must rely on the statement.*—There is no such reliance and therefore no actionable deceit if the fraud

(r) [1914] A. C. 932.

(s) Explained in Salmond & Winfield, *Contracts*, § 82.

(t) For other examples of such fiduciary relations, see Wade, *op. cit.*, 302 *seq.*

(u) (1837), 2 M. & W. 519; 4 M. & W. 337; *Polhill v. Walter* (1832), 3 B. & Ad. 114.

(a) *Peek v. Gurney* (1873), L. R. 6 H. L. 377.

(b) *Andrews v. Mockford*, [1896] 1 Q. B. 372 (W. Cases 151).

consists in some defect in an article sold which is so obvious that the purchaser must have discovered it if he had inspected the article. In other words, if the defect is a patent one and one of which the purchaser is as good a judge as the vendor, the vendor is not bound to point it out. This proposition which was laid down in *Horsfall v. Thomas* (c) seems to be both intelligible and reasonable, but the actual application of it by the Court to the facts has provoked a good deal of criticism. X sold a cannon to Y, stating that it was of the best metal all through and had no weak points that he was aware of. In fact a plug of metal had been inserted in the breech (whether by X or his servants did not appear) in order to conceal defective metal there. After a few rounds had been fired the gun burst owing to this and other flaws. It was held that this was not fraud because Y had the means of knowing the defect and if he had diligently applied them he would have discovered it "because it was patent" (d). This puts an odd meaning on the word "patent". If a fact is discoverable only by the diligent application of means of knowledge, it is scarcely a patent one (e). But, however the decision is to be explained, it is certain that if there is no such obviousness it is still deceit even if the plaintiff had means of verifying the statement and made no use or only a particular use of them. In *Central Ry. of Venezuela v. Kisch* (f), directors of a company made deceitful statements in a prospectus and were held liable to a shareholder defrauded thereby although the prospectus stated that certain documents could be inspected at the company's office and, if the shareholder had taken the trouble to do so, he would have discovered the fraud (g). Indeed, if the fraud is not obvious, it will not help the defendant that he inserted an express clause in a contract with the plaintiff that the plaintiff must verify all representations for himself and not rely on their accuracy, for "such a clause might in some cases be part of a fraud, and might advance and disguise a fraud" (h).

(c) (1862), 1 H. & C. 90.

(d) Bramwell, B., *ibid.*, 101.

(e) Cockburn, C.J., dissented altogether from *Horsfall v. Thomas* in an *obiter dictum* in *Smith v. Hughes* (1871), L. R. 6 Q. B. 597, 605, but in Sir Frederick Pollock's opinion this *dictum* did not appear to have been followed at any rate down to 1911 or to have commanded the assent of the profession: *Shepherd v. Croft*, [1911] 1 Ch. 521, 530, note (1).

(f) (1867), L. R. 2 H. L. 99.

(g) So, too, *Dobell v. Stevens* (1825), 3 B. & C. 623.

(h) *S. Pearson & Son. Ltd. v. Dublin Corporation*, [1907] A. C. 351, 360 (Lord Ashbourne).

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It is to be noted, too, in this connexion that knowledge of the plaintiff's agent is not to be imputed to the plaintiff; e.g., where a house-agent acting for the plaintiff knew that a prospective tenant of the plaintiff's house was a woman of immoral character, but the plaintiff was unaware of this (i).

Ambiguity.

If the statement is ambiguous, the true interpretation of the authorities seems to be that the plaintiff must prove (i) that the statement was reasonably capable of bearing the meaning which he attached to it; (ii) that he understood it in that sense; and (iii) that the defendant made use of the ambiguity with the express purpose of deceiving the plaintiff (k). In *Smith v. Chadwick* (l), the prospectus of a company alleged that "the present value of the turnover or output of the entire works is over £1,000,000 sterling *per annum*". Did this mean that the works had *actually* turned out in one year produce worth more than a million, or at that rate *per year*? If so, it was untrue. Or did it mean only that the works were *capable* of turning out that amount of produce? If so, it was true. The plaintiff failed to prove that he had interpreted the words in the sense in which they were false, so he lost his action. On the question of the actual meaning of the statement, the noble and learned Lords were evenly divided (m), but there is no doubt that if an allegation is deliberately put forth in an ambiguous form with the design of catching the plaintiff on that meaning of it which makes it false, it is fraudulent and indeed is aggravated by a shabby attempt to get the benefit of a fraud without incurring the responsibility (n).

Damage.

§ 117. *Damage*.—The plaintiff must prove that he has suffered damage in consequence of acting upon the statement.

(i) *Wells v. Smith*, [1914] 3 K. B. 722.

(k) Cf. Dr. Williams, 61 L. Q. R. 392; in spite of it, I see no reason for altering my views. Salmond, *Torts*, § 150 (6), also interprets the authorities in a rather different sense; but it is doubtful whether Bowen, L.J., in *Angus v. Clifford*, [1891] 2 Ch. 449, 472, had ambiguous statements in mind at all, and if the whole speech of Lord Blackburn in *Smith v. Chadwick* (1884), 9 App. Cas. 187, be read and not merely the portion of it on p. 201, it is submitted that he required the plaintiff's interpretation to be a *reasonable* one; so, too, Lord Selborne, L.C. (at p. 191) applied to the facts of that case the test, "What interpretation would an intelligent man of business have put upon it [the statement]?" Of course, if the defendant were merely negligent in making the statement, he cannot be liable for deceit; on that point we agree with Salmond.

(l) (1884), 9 App. Cas. 187.

(m) Lord Selborne and Lord Bramwell thought that it had the first meaning, Lord Blackburn and Lord Watson that it had the second.

(n) Lord Blackburn, *ibid.*, 201.

The injury is usually to property, but it may also be to the person (o), as in *Burrows v. Rhodes* (p) where the plaintiff had been induced by the defendant to take part in an invasion of the South African Republic by false statements that protection was needed for British women and children there. The expedition was defeated. For the consequent loss of kit, pay and earnings, the plaintiff recovered £578 odd, and for the loss of his leg £2,421 odd. §§ 117, 118.

§ 118. *Statements required to be in writing.*—The modern Writing. action for deceit, after its invention in 1789, became a potential mode of evading the Statute of Frauds, 1677 (q), which required promises that were guarantees to be in signed writing in order to make them actionable. The common example of a guarantee is, "Supply X with goods and if he does not pay you I will". If that is oral, no action can be brought upon it against me. Now suppose that I say, "You may trust X. He is a very honest man" and I know that X is insolvent, that is not a guarantee for I have not undertaken any responsibility about his payment for anything that you may supply to him; but an action of deceit in tort might lie, although the statement is merely oral, for the Statute of Frauds is limited to *promises* and here there is none. Yet the distinction is an artificial one. Lord Eldon saw alarming possibilities of dodging the Statute in this way and when he was Chief Justice (1799—1801) he succeeded in stopping actions of deceit on such oral representations by urging juries not to find for the plaintiff on the oral testimony of a single witness (r); but it was not until the Statute of Frauds Amendment Act, 1828 (commonly known as Lord Tenterden's Act) (s), that this gap in the law was filled. Section 6 provides that "no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the

(o) The possibility of this is sometimes forgotten: 45 Law Quarterly Review (1929), 347, and note 11a.

(p) [1899] 1 Q. B. 816. So, too, *Work v. Campbell* (1912), 164 California Rep. 343. Cf. *Siveyer v. Allison*, [1935] 2 K. B. 403.

(q) 29 Car. 2, c. 3, s. 4.

(r) *Evans v. Bicknell* (1801), 6 Ves. Jr. 174, 186—187.

(s) 9 Geo. 4, c. 14.

§§ 118, 119. intent or purpose that such other person may obtain credit, money or goods upon (t), unless such representation or assurance be made in writing, signed by the party to be charged therewith".

The section applies only to fraudulent representations (u) and it is more stringent than the Statute of Frauds, for signature by the party's agent will not suffice (a).

Agents.

§ 119. *Statements by agents.*—The liability of a principal for a false statement made by his agent is best stated in a series of propositions.

(1) If P, the principal, knows that the statement is false and expressly authorises A, the agent, to make it, then both are liable as joint tortfeasors if A also does not believe in its truth. If A believes it to be true, he of course is not liable for deceit, but P is on the plain principle that it is just as possible to commit torts by innocent agents as crimes (b).

(2) If P knows that the statement is false, but does not expressly authorise A to make it, and A does so, not believing it to be true, P is liable on the ground of vicarious responsibility in tort, provided A is acting in the course of his employment—a doctrine which applies to deceit as to any other tort (c). But suppose that A believes the statement to be true. It is conceded that A is not liable, for he has committed no tort; and it has been argued that P ought not to be liable because he has authorised none, and vicarious responsibility is inapplicable because the agent himself has perpetrated no tort. The authorities on the point are somewhat confused. In *Cornfoot v. Fowke* (d), P owned a house and employed A to let it. An intending lessee asked A if there were any objection to the house. A replied "Nothing whatever". In fact there was a brothel next door. P knew it. A did not. The lessee, after he had taken the house,

(t) "Upon" is either mistakenly inserted or ought to be placed before "credit". Cf. Pollock, Torts, 239.

(u) *Banbury v. Bank of Montreal*, [1918] A. C. 626. The section does not make any innocent misrepresentation actionable which was not actionable before; it simply does not affect such a representation at all.

(a) *Swift v. Jewsbury* (1874), L. R. 9 Q. B. 301.

(b) *Ludgater v. Love* (1881), 44 L. T. 694.

(c) *Barwick v. English Joint Stock Bank* (1867), L. R. 2 Ex. 259; *Mackay v. Commercial Bank of New Brunswick* (1874), L. R. 5 P. C. 394. It is now settled that it is immaterial either in deceit or any other tort whether the agent intends or does not intend to benefit his principal: *Lloyd v. Grace, Smith & Co.*, [1912] A. C. 716.

(d) (1840), 6 M. & W. 358.

discovered this and gave notice to P of termination of the agreement. The Court of Exchequer, however, held him liable in an action upon the contract by P. They conceded that P would have been liable either if he had expressly authorised A to make the statement or if he had employed A to make it, but here P had done neither of these things.

Cornfoot v. Fowke provoked a good deal of adverse comment in later cases (e). Though it has not been directly overruled (f) the Court took too narrow a view of the principal's responsibility, and the present law may perhaps be stated as follows.

Where there is deliberate non-communication by the principal to the agent of a fact, the existence of which is so vital to the transaction between his agent and a third party that no reasonable person in the third party's position would have entered into the transaction on the terms on which he did if he had known of the facts, then the principal is liable in deceit if the agent innocently alleges to the third party that the fact is otherwise. Modern writers seem to be in fair agreement that the principal ought to be liable, but put forward various reasons why he should be (g). I venture to urge that the best ground is that silence on the principal's part in such circumstances is *suppressio veri* which amounts to *suggestio falsi*. That would certainly cover a case like *Cornfoot v. Fowke*, for the principal must have known that no reasonable person would think of hiring a house if he knew there was a brothel next door (h), and, it is submitted that that case would be differently decided at the present day; but it would, taken in conjunction with *Derry v. Peek* (i), exempt any one from liability to an action for deceit where

(e) *Barwick v. English Joint Stock Bank* (1867), L. R. 2 Ex. 259, 262; *Fuller v. Wilson* (1843), 3 Q. B. 58, 1009, indicated that a principal, who knows or has the means of knowing that the agent was making a false representation, is liable: *Wheelton v. Hardisty* (1857), 8 E. & B. 232, 270—271; *S. Pearson & Son, Ltd. v. Dublin Corporation*, [1907] A. C. 351, 357—358; *London County, etc. Properties, Ltd. v. Berkeley, etc. Co., Ltd.*, [1936] 2 A. E. R. 1039; *Gordon Hill Trust v. Segal*, [1941] 2 A. E. R. 379, 390. Cf. American Restatement of Agency, § 256.

(f) P. Devlin in 53 L. Q. R. (1937), 344—363, where the topic is fully discussed.

(g) Pollock, Torts, 240—241; Bowstead, Agency (10th ed. 1944), p. 212.

(h) And the same applies to facts like those in the *London County, etc. Properties Case*, p. 396, *post*.

(i) (1889), 14 App. Cas. 377. The idea of "moral" as distinct from "legal" fraud had been repudiated earlier than *Derry v. Peek*; see *Joliffe v. Baker* (1883), 11 Q. B. D. 255, 269—271.

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his failure to communicate the information was due to mere inadvertence. A case of some difficulty in this context is *London County, etc. Properties, Ltd. v. Berkeley Property, etc. Co.* (k). A corporation contracted to sell a block of flats to the X Co. The agreement was effected through D, A and R, three agents of the corporation. D was the managing director and solicitor of the corporation, and he had under him A as property manager and R as conveyancing clerk. The X Co. bought on the faith of R's representation that the tenants of the flats paid their rents punctually. R believed this to be true; in fact it was false. R had got the statement from A and the Court of Appeal, without clearly saying that A had committed fraud, regarded him as at least having been economical of the truth (l). What view they took of D's conduct is not clear except that they credited him with knowledge that the statement was untrue. In an action by the X Co. for fraudulent misrepresentation the Court of Appeal held the corporation liable on the ground that the knowledge of A and D was the knowledge of the corporation itself. Now the corporation was a limited company and in general knowledge cannot be imputed to a company unless it is the knowledge of the board of directors (m), and it is not clear why the knowledge of D, one only of the directors, was imputed to the whole board. If we could be sure that the Court held A to be fraudulent, the decision could be explained on another ground—vicarious liability in tort; nor did it matter that the statement was actually made by R, another agent, who was innocent, for a large corporation must have many agents and the Court made it plain that a diffusion of responsibility among such agents is not to be regarded as a dilution of the responsibility of the corporation itself (n).

(k) [1936] 2 A. E. R. 1039.

(l) *Ibid.*, 1046, 1050, 1051. Atkinson, J., in *Anglo-Scottish Beet Sugar Corporation v. Spalding U. D. C.*, [1937] 2 K. B. 607, 624, had no doubt that the C. A. had held A to be fraudulent.

(m) Lord Sumner in *Houghton & Co. v. Northard*, [1928] A. C. 1, 18—19; Buckley, *Companies Acts* (11th ed. 1930), 736.

(n) This is not inconsistent with Atkinson, J.'s interpretation of the case in the *Anglo-Scottish Case* (ante, note (l), [1937] 2 K. B. at p. 627).

CHAPTER XVI

NEGLIGENCE (a).

§ 120. As was stated in an earlier Chapter, negligence is ^{*§§ 120, 121.} an ambiguous term in the law of tort. At the present day it has ~~two~~ meanings : Ambiguity of negligence.

✓ (1) A mental element which is to be inferred from one of the modes in which some (but by no means all) torts may possibly be committed. Thus it is possible to commit torts like defamation, nuisance or trespass not only intentionally, but also "negligently". The mental element signified by this is usually total or partial inadvertence on the part of a person to the nature of his conduct and/or its consequences. Yet it may also include full advertence to both (b). But even when this is so there is no desire for the consequences and this is what distinguishes negligence from intention.

✓ (2) An independent tort which consists of breach of a legal duty in the mode described above, followed by damage.

This double meaning has been steadily developing for the last century or so and some account of the earlier law is necessary to make the present position completely intelligible.

✓ § 121. Historical sketch. † History

I have dealt fully with the history of negligence elsewhere (c) and an epitome of what I have said is all that is needed here. From the Norman period to the early nineteenth century, there is no analysis in our law books of tortious negligence, much less does the dichotomy under discussion appear.

(a) A monograph much used by English practitioners is Beven, *Negligence in Law* (4th ed. 1928). The current edition takes no account of changes in theory. These are adequately treated in Charlesworth, *Negligence* (2nd ed., 1947). For an American analysis, see Leon Green, *Judge and Jury* (1930), Chaps. I—V. My own suggestions are embodied in 42 *Law Quarterly Review* (1926), 184—201; 34 *Columbia Law Review* (1934), 41—66; *Encyclopædia of Social Sciences*, "Negligence". In America, the Restatement of the Law of Torts, Vol. II, *Negligence*, is all the more important as an attempt to find a common denominator on that topic in the various States because its preparation was chiefly in the hands of Professor Francis H. Bohlen. For an appreciation of it from an English point of view, see 13 *New York University Law Quarterly Review* (1935), 1—18. For a general statement of American law, see *Corpus Juris*, *tit.* "Negligence".

(b) *Vaughan v. Menlove* (1837), 3 Bing. N. C. 468.

(c) 42 *Law Quarterly Review* (1926), 184—201; 34 *Columbia Law Review* (1934), 41—66.

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But, although the law had little to say about negligence, it had nevertheless in many respects grasped the mental element inherent in it, and if we transplanted the "reasonable man", who figures so largely in negligence nowadays, to the Year Book period we should find him behaving much as he does now except that he was much less accountable for harm arising from mere omissions. True, the remedies afforded by the various actions upon the case fell short of the current law but by the early nineteenth century their scope had gradually been extended until all that was needed to bring the law to its present shape was a change in form and a statement of a general rule instead of an enumeration of particular instances.

One of the most important of these instances, if not the earliest, was the liability of those who professed competence in certain callings. "It is the duty of every artificer to exercise his art rightly and truly as he ought." So said Fitzherbert in the early sixteenth century (d) and he was voicing a rule which was well known 150 years earlier. Two conspicuous examples were the innkeeper and the common carrier. They were liable for loss occasioned to their customers by carelessness in dealing with the goods entrusted to them, and the duty was a stern one, for men must put a great deal of confidence in them, and in all ages their opportunities of theft or of allying themselves with thieves have been easy. Many other callings implied a duty of carefulness. Such were those of the apothecary or surgeon and the attorney, and indeed it is hard to say where the law stopped in this direction except for the somewhat vague limit that the calling must be "common" or "public". This included the ferryman, the farrier, the sheriff, the gaoler and perhaps even the barber.

Then in quite another region negligent conduct gave rise to an action upon the case of another sort,—that for nuisance and many an instance of nuisance is only a mask for negligence. Yet another veil was the action for trespass, for it mattered not a straw whether the trespass were intentional or negligent; the defendant was liable either way.

Literary exposition of negligence was almost completely lacking until Comyns' Digest was published in 1762. He put a great mass of unsifted material under the captions "Action

(d) *Natura Brevium*, 94 D.

upon the case for negligence", "Case for disturbance" and "Case for misfeasance". Here, as always, the vital question was, "What is my remedy?" not "What tort has the defendant committed against me?" And it would have been a senseless inquiry to ask a lawyer, "Is negligence a state of mind or is it an independent tort?" for he would not have understood it. His view might be thus expressed: "If some one has carelessly injured you, you may possibly have an action upon the case of one sort or another, or even an action for trespass."

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But in the nineteenth century, more exact ideas slowly came into being. If one must select a date, perhaps their growth may be traced from about 1825 onwards. It was probably stimulated a good deal by the enormous increase of industrial machinery in general and by the invention of railways in particular. At that time railway trains were notable neither for speed nor safety. They killed any object from a Minister of State to a wandering cow and this naturally reacted upon the law. "Actions upon the case for negligence" in doing or not doing something became plentiful. Was this action a mere film which thinly disguised what was destined to become an independent tort, or was it simply a claim for redress of harm perpetrated in a particular way? The answer is that neither alternative can be selected to the exclusion of the other. Both elements are traceable in the earlier part of the nineteenth century and that is how the matter stands at the present day. For a long time the idea that negligence is in itself a tort was never stated in so many words, but there was a subconscious realisation of it. A man did no wrong merely because he drove a steam-engine or a gig, sailed a boat, owned a hay-rick or a cellar-flap, or pulled down his own house. But when he was careless in his management of any such thing and thereby injured another person, he was liable; and this inadvertence and the consequent damage were the gist of the action and the only things in respect of which it was brought. They constituted "negligence" which was a tort and not simply negligence which was one of the possible ways of committing certain other torts.

Writers on tort had to wait until almost our own generation before they could venture to assert that this new meaning

§§ 121—123. exists side by side with the other one (e), and it is only comparatively recently that a frank avowal of it is to be found in the reports; but both the House of Lords and the Judicial Committee of the Privy Council have now recognised it (f).

Essentials.

✓§ 122. Essentials of negligence.

Negligence as a tort is the breach of a legal duty to take care which results in damage, undesired by the defendant, to the plaintiff. Thus its ingredients are: (1) A legal duty on the part of A towards B to exercise care in such conduct of A as falls within the scope of the duty. (2) Breach of that duty. (3) Consequential damage to B.

Duty.

✓§ 123. Duty.

A merely moral or religious duty will not suffice; it must be one recognised by the law. It may be objected that, even so, "duty" is not confined to the law of negligence and that it is an element in every tort, because there is a legal duty not to commit assault or battery, not to commit defamation, not to commit nuisance and so forth. But all that "duty" signifies in these other torts is that you must not commit them. It throws no light on their essential ingredients. Thus it will not tell us what the plaintiff must prove in assault in order to be successful. Breach of it is not one of the internal factors which constitute these other torts. But in the tort of negligence breach of "duty" is the chief ingredient of the tort; in fact there is no other except damage to the plaintiff.

What then does "duty" mean? (g). The answer seems to be that the plaintiff cannot win his action unless he can

(e) Some writers either ignore it or deny it. Beven, *op. cit.*, i, 1 *seq.*; Jenks, *History of English Law* (ed. 1934), 319—320. Dr. Stallybrass, the learned editor of *Salmund, Torts*, has abandoned the views of his author on this point; cf. sixth ed., § 5 and eighth and ninth eds., §§ 7, 120, and now tenth ed., §§ 7, 119, (1). In the current edition of Clerk & Lindsell, *Torts* (1947), 311—343, the view which we have set out has been adopted.

(f) *Donoghue v. Stevenson*, [1932] A. C. 562, especially the speech of Lord Atkin; *Lochgelly Iron, etc., Co., Ltd. v. M'Mullan*, [1934] A. C. 1, 35; *Grant v. Australian Knitting Mills, Ltd.*, [1936] A. C. 85, 101, 103; Lord Wright, M.R., in *Nicholls v. Ely Beet Sugar Factory, Ltd.*, [1936] Ch. 343, 351.

(g) The analysis in Beven, *op. cit.*, i, 7—8, is instructive, but too vague to be of much practical value. Moreover, it includes intentional harm which neither in law nor in morals has ever been identified with negligence except in *culpa lata* or "gross" negligence.

show *in limine* facts from which the Court can deduce a legal obligation on the part of the defendant towards the plaintiff to take care. (Duty means a restriction of the defendant's freedom of conduct, and the particular restriction here is that of behaving as a reasonably careful man would behave in the like circumstances. The decision of this is always a question of law for the Judge.)

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The history of how the idea of duty crept into the law of negligence is a curious one. I have treated it at length elsewhere (h) and no useful purpose would be served by giving even an outline of it here. All that need be said is that its germ is perceptible in *Vaughan v. Menlove* (1837) (i), *Langridge v. Levy* (1837) (k) and *Winterbottom v. Wright* (1842) (l) and that it developed fitfully until Lord Esher gave it sharp expression in *Heaven v. Pender* (1883) (m). It is now firmly rooted in our law, for the House of Lords has recognised it; it seems to me superfluous, but repetition of the reasons which have led me to this conclusion would be out of place here (n).

How is the Judge to determine whether there is, or is not, a duty? His task is easy where earlier decisions have established one. Time out of mind it has been held that men must use care in driving vehicles on the highway, in handling deadly implements or substances, in plying their trades where their neighbours are about; and for circumstances much more particular than these which may create a duty there is a wealth of decisions in the reports. But "the categories of negligence are never closed", and what is the Judge to do if, as often happens, there is no precedent exactly in point? The *locus classicus* for a reply to this is Lord Atkin's speech in the House of Lords in *Donoghue v. Stevenson* in 1932 (o):

Criterion of duty.

"In English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of 'culpa', is no doubt based

Donoghue v. Stevenson.

(h) 34 Columbia Law Review (1934), 41—66.

(i) 3 Bing. N. C. 468.

(k) 2 M. & W. 519; 4 M. & W. 337.

(l) 10 M. & W. 109.

(m) 11 Q. B. D. 503. 34 Columbia Law Review, 51—57.

(n) 34 Columbia Law Review, 58—65.

(o) [1932] A. C. 562, 580 (W. Cases 154).

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upon a general public sentiment of moral wrong-doing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, *Who is my neighbour?* receives a restricted reply. *You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question*” (p).

In *Donoghue v. Stevenson*, a manufacturer of ginger-beer had sold to a retailer ginger-beer in an opaque bottle. The retailer resold it to A who treated a young woman of her acquaintance to its contents. These included the decomposed remains of a snail which had found its way into the bottle at the factory. The young woman alleged that she became seriously ill in consequence and sued the manufacturer for negligence. There was of course no contractual duty on the part of the manufacturer towards her, but a majority of the House of Lords held that he owed her a duty to take care that the bottle did not contain noxious matter and that he was liable if that duty was broken. With great respect to the noble and learned lords who dissented, they appear to have been influenced in their judgment by the fallacy that *because* there was no contractual liability on the manufacturer's part to the plaintiff *therefore* there could be no liability in tort. This fallacy was injected into our law in 1842 (q), it was a *non sequitur* destined to have expensive consequences for the English litigant and it died a hard death in *Donoghue's Case*. The Judicial Committee of the Privy Council, in following *Donoghue's Case* in 1935 in *Grant v. Australian Knitting*

(p) The italics are mine. Lord Macmillan's speech is equally important and instructive ([1932] A. C., at pp. 605–623).

(q) By some *dicta* in *Winterbottom v. Wright* (1842), 10 M. & W. 109. Historically, the fallacy is intelligible; 34 Columbia Law Review, 53 *seq.*

Mills, Ltd. (r), gave it decent burial. In fact, contractual liability is completely irrelevant to the existence of liability in tort. The same facts may give rise to both, but it is wrong to assume that, because A is bound by a contract to B, therefore harm resulting from A's breach of that contract to C, a third party, can never give rise to liability in tort on A's part to C (s).

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✓ There is no reason to think that Lord Atkin in *Donoghue's Case* used the word "neighbour" as signifying geographical proximity of the person injured to the wrongdoer. Indeed such proximity is irrelevant, for it may exist and yet give rise to no legal duty, e.g., where I build so as to obstruct my neighbour's prospect (as distinct from his right of light); and conversely it may not exist and yet there may be a legal duty, e.g., where a harmful thing is manufactured in Newcastle and causes injury to some one living in Southampton (t).

✓ *Woods v. Duncan (u)* shows that Lord Atkin's test involves the element of causation in the sense that the whole chain of events leading up to an accident must be taken into account in determining which, if any, of them ought reasonably to have been foreseen; but it is quite distinct from causation in connexion with remoteness of damage (*ante*, § 21), for there a tort has certainly been committed and the question is whether it was the defendant's conduct that was the determinant cause of the injury; on the other hand, in the case of "duty", the question is whether a tort has been committed at all. The facts of *Duncan v. Woods* may be summarised as follows. The Admiralty employed the C. L. Co. to build a submarine. The C. L. Co. employed the B. Co. for certain painting of it. Servants of B. Co. obstructed a test-cock with bitumastic enamel. When the submarine put to sea for trials, Lieut. W.,

(r) [1936] A. C. 85, 101—102. Some of the cases in the Courts below the H. L. in which *Donoghue's Case* has been applied are *Brown v. Cotterill* (1934), 51 T. L. R. 21; *Malfrut v. Noral* (1935), 51 T. L. R. 551, *Paine v. Colne Valley, etc. Co., Ltd.* (1938), 55 T. L. R. 181; *Sharp v. Avery*, [1938] 4 A. E. R. 85, 90; *Hanson v. Wearmouth Coal Co.* (1939), 55 T. L. R. 747; *Read v. Croydon Corporation* (1938), 108 L. J. K. B. 72; *Barnes v. Irwell Valley Water Board*, [1939] 1 K. B. 21. The double aspect of some of these decisions is noted, *post*, § 160.

(s) Winfield, *Province of Tort*, 73—76.

(t) Cf. Scrutton, L.J., in *Farr v. Butlers Bros. & Co.*, [1932] 2 K. B. 606, 613—614.

(u) [1946] A. C. 401 (reported as *Duncan v. Cammell Laird & Co.* in the Courts below: (1944) 171 L. T. 186). The case is noted in 62 L. Q. R. 205.

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not knowing of the obstruction, used the test-cock. The submarine was lost in consequence and D. and C., who were on board, lost their lives. Their wives sued Lieut. W., C. L. Co. and B. Co. for negligence. The House of Lords held, (1) reversing the Court of Appeal, that Lieut. W. was not liable, for, though *res ipsa loquitur* (*post*, p. 410), his evidence showed that there was no lack of reasonable care on his part; (2) affirming the Court of Appeal, that C. L. Co. and B. Co. were not liable, for, though they had been careless, no duty to take care was established with respect to D. and C., because the defendants could not reasonably foresee that the blocking of the test-cock would lead to the loss of the submarine.

^v It must be observed that "reasonable care" and "reasonable foresight" in Lord Atkin's speech still leave upon the Judge the task of settling in each particular case what is "reasonable". To that extent, the test of the "reasonable man" is subjective and not merely objective (*v*). Nothing will release the Judge from the difficulty involved in this subjective side, for any attempts to get a hard-and-fast definition of "reasonable" would only mechanise the law on this point. But the elasticity which is inherent in "reasonable" not unnaturally leads to some curious results. The layman may think it odd that while a medical practitioner is under a legal duty in the law of tort to use reasonable care towards a patient even if there be no contract between them, yet no ordinary bystander is under a duty to attempt the rescue of a child from drowning in what he knows to be shallow water.

[†] The facts and decision in *Bourhill v. Young* have already been set out (*a*). We refer again to the case here because the decision was based upon the absence of a duty to take care. The *ratio decidendi* was that the duty of the driver of a vehicle on the highway to take care towards other users of the highway is limited to persons so placed that they may reasonably be expected to be injured by the omission to take care (*b*). This certainly does not mean that the distance of the driver from the person injured is, by itself, a determinant factor of the existence or non-existence of the duty, for, as Lord Wright said, "the ambit of the persons affected by negligence or

(*v*) *Glasgow Corporation v. Muir*, [1943] A. C. 448, 457 (*per* Lord Macmillan).

(*a*) [1943] A. C. 92, *ante*, p. 78.

(*b*) [1943] A. C. at pp. 102, 104. See, too, *Farrugia v. G. W. Ry.*, [1947] 2 A. E. R. 565.

misconduct may extend beyond persons who are actually subject to physical impact" (c); and this is in accord with Lord Atkin's view in *Donoghue v. Stevenson* (*supra*) (d).

§§ 123, 124.

§ 124. Breach of duty.

Breach
of duty
Test: the
"reasonable
man".

The test for deciding whether there has been a breach of duty is laid down in the oft-cited *dictum* of Alderson, B., in *Blyth v. Birmingham Waterworks Co.* (e): "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." As was suggested in § 11, the reasonable man's behaviour is that of an abstract conception (the ordinary man) in any particular event or transaction, including in such behaviour obedience to the special directions (if any) which the law gives him for guidance in that connexion. Thus where there are no such directions and where the law does not credit him with any special skill, he is a person of average prudence. He is "the man on the Clapham omnibus". He has not the courage of Achilles, the wisdom of Ulysses or the strength of Hercules (f). On the other hand, any actual person who possesses these qualities in a high degree is not to be penalised on that account. A man who is brave enough to attempt to

(c) *Ibid*, 108.

(d) During the recent World War a matter that gave rise to much litigation was the duty of highway authorities with respect to the safety of obstructions created by them on the highway. The question usually concerned giving warning of the existence of an obstruction, especially during the "black-out". In *Fisher v. Ruistip-Northwood U D C.*, [1945] K. B. 584, the C. A. fully examined the earlier decisions and found some of them conflicting. In following the decisions for which they expressed a preference, they laid it down that a highway authority is under a duty to take reasonable steps to prevent an obstruction (whether erected during war or in time of peace) from becoming a danger to the public, and to give adequate warning of its existence both by night and by day. Where the obstruction is erected under statutory authority, the primary guide in ascertaining the obligation of the highway authority is, of course, the statute itself, but the C. A. pointed out that if a statute merely empowers a highway authority to construct an obstacle which is dangerous to the public, the authority is just as much under a duty to make reasonable provision for the safety of the public as it would be if it constructed the obstacle under a Common Law power. *Fisher's Case* was applied by the C. A. in *Morris v. Luton Corporation*, [1946] K. B. 114; see, too, *Whiting v. Middlesex C C*, [1947] 2 A. E. R. 758.

(e) (1856), 11 Ex. 781, 784.

(f) *Pace* Lord Bramwell, who occasionally attributed to the reasonable man the agility of an acrobat and the foresight of a Hebrew prophet.

§ 124.

*Imperitia
culpa
adnumeratur.*

rescue anyone in imminent peril of death or great bodily harm is not reckoned by the law as unreasonable (g).

Where any one is engaged in a transaction in which he holds himself out as having professional skill (h), the law expects him to show the average amount of competence associated with the proper discharge of the duties of that profession, trade or calling, and if he falls short of that and injures someone in consequence, he is not behaving reasonably. The rule *imperitia culpa adnumeratur* is just as true in English law as in Roman law (i). It is notable that in most professions and trades each generation convicts its predecessor of ignorance and that there is a steady rise in the standard of competence incident to them. Surgery has long passed the stage when Socrates could describe it as "cutting and cautery". In England it was at one time in the hands of the blacksmith, the weaver and the barber, not to mention the quack, and even two generations ago operations were conducted in a mode which precautions of our own age have made negligent. In the fifteenth century, the attorney's profession was frequently the refuge of the profligate and incompetent (k). Nowadays a solicitor "is liable for the consequences of ignorance or non-observance of the rules of practice of this [sc. the High] Court; for the want of care in the preparation of the cause for trial; or of attendance thereon with his witnesses: and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession" (l). In this respect the barrister is an anomaly. In 1860, the Exchequer Division were of opinion that no action had ever been successfully maintained against a barrister for neglect of duty, although they admitted that he might be liable in a contract if

(g) *Haynes v. Harwood*, [1935] 1 K. B. 146 (*ante*, p. 75).

(h) Cf. *Philips v. William Whiteley, Ltd.*, [1938] 1 A. E. R. 566.

(i) Buckland & McNair, *Roman Law and Common Law* (1936), 198.

(k) A solicitor is said to have thrashed his clerk because he had been too prompt in expediting the business of his client. Winfield, *Abuse of Legal Procedure*, 24.

(l) *Fletcher & Son v. Jubb*, [1920] 1 K. B. 275, 279. The result of the authorities is that where the retainer of a solicitor springs from a contract between him and his client, his duty to take care is founded solely upon that: *Groom v. Crocker*, [1939] 1 K. B. 194; but that where there is no contract he is liable in tort for breach of the duty; *semble* from *Donaldson v. Haldane* (1840), 7 Cl. & F. 762; cf. Cordery, *Solicitors* (4th ed. 1934), 163, and notes. There is no duty to give advice on a matter of business (as distinct from a matter of law) with respect to which no retainer has been given by the client to the solicitor: *Yager v. Telf & Telf*, [1944] 1 A. E. R. 552.

there were an express agreement or if he intentionally did a wrong and acted with malice, fraud or treachery (*m*). The reason for this exemption is that in theory his services are gratuitous (*n*), and although that, by itself, is not a sufficient ground for preventing a legal duty from arising in other circumstances, the rule with regard to the barrister is inveterate, whatever be its justification.

§ 124.

Whether the care that has been taken is or is not reasonable is a question the answer to which must vary with circumstances. No reasonable man handles a stick of dynamite and a walking-stick in the same way. But that is not an admission that there are different degrees of negligence in the law of tort in the sense that negligence may possibly be "gross", or "ordinary", or "slight". "Gross" negligence is a familiar term in criminal law and it does occasionally occur in judicial language in civil cases (*o*). But when it is said that leaving a loaded gun where children are likely to play with it is "grossly negligent" all that is meant in the law of tort is that the person who left it there was obviously not showing reasonable care (*p*).

"Reasonable" varies with circumstances.

Functions of Judge and jury.—In the assessment of reasonable care, the Judge must first be satisfied that the facts presented to him by the plaintiff show reasonable evidence of lack of care; if they do not, he must stop the case, and if he is sitting with a jury he must not allow the case to go to them or, in technical parlance, he must non-suit the plaintiff. But if there is such reasonable evidence, then the jury must be allowed to settle whether the defendant did, in all the circumstances of the case, behave unreasonably, or, as it is commonly said, whether he were negligent. This, of

Judge and jury.

(*m*) *Swinfen v Lord Chelmsford* (1860), 5 H & N. 890, 918—919

(*n*) Beven, *op cit*, n, 1407 If counsel exceeds his authority, the Court may relieve the client by setting aside acts done in excess of it *Neale v Gordon Lennox*, [1902] A. C. 465.

(*o*) The older Admiralty view, that liability is limited to gross negligence, has been abandoned; *The Dwina*, [1892] P. 58, 61, *Anglo Saxon Petroleum Co v Damant*, [1947] 1 K. B. 794.

(*p*) Lord Macmillan's reference in *Glasgow Corporation v Muir*, [1943] A. C. 448, 456, to "degree of care" is to the like effect It has been stated that, in determining whether conduct is reasonable or not, regard must be had (1) to the magnitude of the risk to which the defendant exposes the other person, and (2) to the importance of the object to be attained by the dangerous form of activity *Salmond, Torts*, § 121 (5); or, as Asquith, L J said in *Daborn v Bath Tramways Motor Co, Ltd*, [1946] 2 A. E. R. 333, 336, "one must balance the risk against the consequences of not assuming the risk".

§ 124.

Evidence
sufficient
for jury.

course, they can do only after hearing all the evidence,—that of the defendant (if he has any to offer) as well as of the plaintiff.

This distinction of functions has come to be an important one and a large percentage of the appeals in litigation on negligence has been upon the question whether the Judge was right in allowing the case to go to the jury or in withdrawing it from them. Naturally any guide for the exercise of his discretion must be rather vague but, subject to that, he should act upon the following principles. “A scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendants, clearly would not justify the Judge in leaving the case to the jury: there must be evidence upon which they might reasonably and properly conclude that there was negligence” (q).

So, too, if the plaintiff's evidence is equally consistent with the absence as with the existence of negligence on the part of the defendant, the case ought not to go to the jury. *Cotton v. Wood* (r) illustrates this. A woman, in attempting to cross the road, successfully passed in front of an oncoming omnibus drawn by horses. The driver, seeing that she was clear, turned round to speak to the conductor. While he was doing so, the woman, alarmed at the approach of another vehicle in the opposite direction, turned, began to retrace her steps and was knocked down and killed by the omnibus. In an action under the Fatal Accidents Act, 1846, it was held that there must be a non-suit. The mere fact that the driver had turned to speak to the conductor was no evidence of negligence (s) and the facts were just as consistent with the woman having run against the omnibus as with the omnibus having run against her.

*Jones v.
G. W. Ry*

An instructive case on the other side of the line is *Jones v. G. W. Ry.* (1931) (t). X was employed at B's works. Access to them was possible only across two parallel sidings of the defendant railway company. X left B's works at 2 p.m. He was discovered shortly afterwards dead between the buffers of two railway wagons on the siding which

(q) Williams, J., in *Toomey v. L. B. & S. C. Ry.* (1857), 3 C. B. (n.s.) 146, 150.

(r) (1860), 8 C. B. (n.s.) 568.

(s) It might have been in some circumstances; e.g., if he did so for the purpose of retailing some witticism to the conductor.

(t) 144 L. T. 194.

was more remote from B's works. The evidence showed that just before the accident there was a gap of about five feet between these wagons, that there were several other batches of wagons on the same siding with varying gaps between them, that shunting was going on, that an employee of the railway was assisting in the shunting by signalling to the engine-driver, that he had a clear view for more than 100 yards up and down the rails and that he never warned the deceased because he never saw him. By a majority of four to one the House of Lords held that the case had been rightly left to the jury. Two passages from the speeches may be cited :

"There are two areas separated by an indefinite line, in either of which such a case as the present may be found; one is the region of pure conjecture, and the other that of reasonable inference. . . . The question here is to which territory this case should be assigned. It is a mistake to think that because an event is unseen [as was X's death here] its cause cannot be reasonably inferred" (Lord Buckmaster, at p. 197).

Distinguish
pure conjecture
and
reasonable
inference.

"The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible, but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof. The attribution of an occurrence to a cause is, I take it, always a matter of inference. The cogency of a legal inference of causation may vary in degree between practical certainty and reasonable probability" (Lord Macmillan, at p. 202).

Lord Hailsham, while deprecating meticulous comparison of cases, distinguished an earlier decision of the House in *Wakelin v. L. & S. W. Ry.* (1886) (u), where the dead body of a man was found on a railway line near a level crossing at night. He had been killed by a train which carried the usual headlights but did not whistle or otherwise give warning of its approach. The level crossing was guarded by hand-gates. No evidence was given as to how the deceased had got on the line. In an action under the Fatal Accidents Act, 1846, the House held that even assuming (but without deciding) that

(u) 12 App. Cas. 41.

there was evidence of negligence on the defendant's part, yet there was no evidence to connect such negligence with the accident, and that there was no case to go to the jury. In *Jones v. G. W. Ry.*, Lord Hailsham pointed out (at p. 196) that in *Wakelin's Case* (1) the deceased must have been taken to know that if he remained on a line where trains run at high speed (and are not merely shunted), he was bound to be run over; and (2) unless he were blind or deaf, the noise and glare of the approaching train gave him ample warning of its approach.

Res ipsa loquitur.

Res ipsa loquitur.—The rules which we have been discussing are qualified by the maxim *re ipsa loquitur*, which was explained in the following way by the Court of Exchequer Chamber in *Scott v. London and St. Katherine Docks Co. (v)*: "Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care." The plaintiff was a customs officer. As he was passing in front of the defendant's warehouse on the docks in the discharge of his duties, six bags of sugar fell upon him from a crane which was lowering them from the warehouse. It was held that this constituted reasonable evidence of negligence to leave to the jury.

So, too, the maxim applies where a barrel of flour rolls out of a warehouse abutting on the street and falls upon a passer-by (*w*), or where a brick falls from the arch of a railway bridge spanning the highway and injures some one walking there (*x*), or where a motor car left unattended in

(v) (1865), 3 H. & C. 596, 601 (W. Cases, 170); adopted by Scrutton, L.J., in the Court of Appeal in *Halliwell v. Venables* (1930), 143 L. T. 215, and in the Divisional Court in *Ellor v. Selfridge & Co., Ltd.* (1930), 46 T. L. R. 236. See, too, *Mahon v. Osborne*, [1939] 2 K. B. 14, 23; and *Easson v. L. & N. E. Ry.*, [1944] K. B. 421, especially du Parcq, L.J., at pp. 425—426. Another statement of the rule by Fletcher Moulton, L.J., in *Wing v. L. G. O. Co.*, [1909] 2 K. B. 652, 663, is probably too wide: see Bankes, L.J., in *McGowan v. Stott* (1930), 143 L. T. 217, 218. The principle appears as early as *Christie v. Griggs* (1809), 2 Camp. 79; its Latin form is much later. It is untraceable in the civil law, although my learned friends Professor Buckland and Mr. Ashton Cross told me that phrases like "*res loquitur ipsa*" and "*res ipsa indicat*" occur in Cicero and other lay literature.

(w) *Byrne v. Boadle* (1863), 2 H. & C. 722.

(x) *Kearney v. L. B. & S. C. Ry.* (1871), L. R. 6 Q. B. 759.

the street runs down-hill and does damage (a). It is a matter of common sense that accidents of this sort do not happen without presumptive negligence on the part of the person supposed to be in control of the thing which has caused the damage. The defendant may be able to rebut the presumption, but rebut it he must if he wishes to escape liability (b). If he can show a way in which the accident may reasonably have occurred without negligence on his part or on the part of those for whom he is responsible, then the plaintiff is left where he began, *i.e.*, he must prove negligence (c). In *Scott's Case* (*ante*), it would not have been a reasonable suggestion that the bags of sugar might have dropped from a passing balloon (d) unless, indeed, it were proved that a balloon laden with such a cargo was passing at the time.

It must be noted that although the maxim implies that some one has been negligent it does not necessarily imply *who* was negligent, and this is a matter of some importance in cases where the defendant is liable only for personal negligence, *e.g.*, in providing safe appliances for his servants. In *Cole v. De Trafford* (*No. 2*) (e), a chauffeur was injured by the fall of a heavy piece of glass upon his hand from a door into which it was fastened in his employer's garage. Instead of being properly set in the door it was insecurely held there by a nail. Who was responsible for having done this or when it was done did not appear. In an action against his employer it was held that the maxim was inapplicable, for, although *res loquitur*, yet it said nothing to indicate that the employer was the person through whose negligence the accident had occurred.

(a) *Parker v. Miller* (1926), 42 T. L. R. 408. The mere fact that a motor vehicle skids is not evidence of negligence: *Laurie v. Raglan Building Co., Ltd.*, [1942] K. B. 152; the authorities were reviewed in *Liffen v. Watson* (1939), 161 L. T. 351 (reversed on another point, [1940] 1 K. B. 556). As to an unfastened door in a railway carriage, see *Easson v. L. & N. E. Ry.*, [1944] K. B. 421; *Brookes v. L. P. T. B.*, [1947] 1 A. E. R. 506.

(b) The evidence requisite for such rebuttal is discussed in the Scottish cases, *Ballard v. N. B. Ry.*, [1923] S. C. (H. L.) 43, and *O'Hara v. Central S. M. T. Co., Ltd.*, [1941] S. C. 363.

(c) *Woods v. Duncan*, [1946] A. C. 410 (*ante*, p. 403); *The Kite*, [1933] P. 154, 166—170; *The Mulberry*, [1937] P. 82; Lord Greene, M.R., in *Duncan v. Cammell, Laird, Ltd.* (1944), 171 L. T. 186, 195.

(d) [1933] P. at p. 169.

(e) [1918] 2 K. B. 523, 528—529, 538.

§ 125.

Contributory negligence.

§ 125. Contributory negligence (*f*).

If, though the defendant has been negligent, the plaintiff has also been negligent, at Common Law he could not recover if his own negligence were either (i) the decisive cause of the accident, or (ii) so closely implicated with the negligence of the defendant as to make it impossible to determine whose negligence was the decisive cause. The Law Reform (Contributory Negligence) Act, 1945, allows him to recover, but makes reducible the amount of damages recoverable (*post*, p. 424).

This is the doctrine of contributory negligence (*g*). It can be pleaded as a defence, not only to the tort of negligence, but also to negligence as a mode of committing other torts, *e.g.*, nuisance (*h*). In the sense of its being complementary to negligence it is naturally of late origin in our law because modern ideas about negligence itself have been developing for little more than a century. But even in early law the conception is traceable. Thus, strict as was the liability of an innkeeper for the safe-keeping of the guest's goods, yet it was negated if they were stolen by the guest's own fault (*i*). Traces of the doctrine in its modern shape appear at the beginning of the nineteenth century, although rather in the form of *volenti non fit injuria* (*k*) or in the requisite that the plaintiff as well as the defendant must use ordinary care than in any such phrase as contributory negligence. Thus in *Butterfield v. Forrester* (1809) (*l*), A wrongfully obstructed a road by putting a pole across it. B, riding violently on the

(*f*) The periodical literature on the topic is enormous. In Anglo American Law journals there were, between 1928 and 1934 alone, some ninety articles of one sort or another on contributory negligence. Index to Legal Periodicals, 1928—1931, 1931—1934 (ed. Eldon R. James). Three earlier ones worth study are those by Professor F. H. Bohlen, *Studies in the Law of Torts* (1926, Indianapolis), 500—538; Mr. William Schofield, *Selected Essays in the Law of Torts* (1924, Camb. Mass.), 543—547, and Lord Justice O'Connor in 38 *Law Quarterly Review* (1922), 17—25. For a comparison with Roman Law, see Buckland & McNair, *op. cit.*, 288—291.

(*g*) The phrase, though established, is misleading in that it might appear to include any event connected with the causation of the accident. But, in fact, unless the negligence were such as to contribute materially to the accident, it must be ignored; Lord Porter in *Caswell's Case*, [1940] A. C. 152, 185—186.

(*h*) Lord Atkin in *Caswell's Case*, [1940] A. C. 152, 165.

(*i*) *Sanders v. Spencer* (1567), 3 Dyer 266b. In 1470 Choke, J., said that if A's cattle stray to my land because I have neglected a prescriptive duty to fence my own land, I shall not have an action against A, "for that is my own default": Y. B. Pasch. 10 Edw. 4, S. S. vol. 44, p. 68. This is cited as an example of the idea in Holdsworth, *Hist. of English Law*, III, 378.

(*k*) *Cruden v. Fentham* (1799), 2 Esp. 685.

(*l*) 11 East 60.

road in the dusk, was overthrown by the pole and injured. The pole was discernible at a distance of 100 yards. It was held that A was not liable to B. Bayley, J., said: "If he had used ordinary care he must have seen the obstruction; so that the accident appeared to happen entirely from his own fault"; and Lord Ellenborough, C.J., added: "One person being at fault will not dispense with another's using ordinary care of himself."

The principle upon which contributory negligence is based has been much debated. The judgments in *Butterfield v. Forrester* are so jejune that the doctrine seems to have been taken for granted. At any rate, as Professor F. H. Bohlen has pointed out, the Court was not aware that it was enunciating any new rule, and all attempts to find a theory for it must therefore be *ex post facto* (m). The following bases have been suggested.

Principle
unsettled

(1) The penal theory. One who has suffered harm which is due partly to his own negligence, partly to that of another person, cannot recover against that other person because he ought to be punished for his own negligence. *In pari delicto potior est conditio defendentis* (n).

(2) The plaintiff and defendant are joint tortfeasors and a Common Law rule denies indemnity or contribution between joint tortfeasors. But this theory has never made much headway and has been rightly riddled with criticism by Professor Bohlen (o).

(3) *Volenti non fit injuria*. The plaintiff cannot recover because he assented to risk of the injury which befell him. Here again Professor Bohlen has pointed out many differences between this maxim and contributory negligence (p), but, as was noted in the section on the maxim, the clear distinction laid down by Bowen, L.J., in 1887 in *Thomas v. Quartermaine* (q) has not always been observed in later cases (r).

(4) Public policy. Mr. Schofield puts most weight upon "the desire to prevent accidents by inducing each member

(m) Studies in the Law of Torts, 500.

(n) Lord Halsbury, L.C., in *Wakelin v. L. & S. W. Ry.* (1886), 12 App. Cas. 41, 45. So, too, Lord Blackburn in *Cayzer & Co. v. Carron Co.* (1884), 9 App. Cas. 873, 881. The view was rather favoured by some rulings in *vis prius* cases in the earlier part of the nineteenth century: Mews, Digest of English Case Law, *tit.*, "Negligence—Contributory Negligence".

(o) *Op. cit.*, 511.

(p) 18 Q. B. D. 685.

(q) *Ibid.*, 516 *seq.*

(r) *Ante*, p. 38.

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of the community to act up to the standard of due care set by the law" (s).

(5) Causation, or remoteness of damage. The plaintiff cannot recover if his own negligence were the decisive cause of the harm which he suffered.

It would be rash to select any one of these theories to the exclusion of all the others as having solely influenced the development of the law of contributory negligence. Indeed all of them are traceable in a greater or less degree; but in English law, at any rate, the penal theory and the causation theory are probably the most marked. The penal theory is inadequate and must now be discarded. Its obvious weakness is that if it were true the plaintiff could never recover. Be his negligence small or great, he would be punished just the same. But that is certainly not the law. He can and will recover if, although he were negligent, yet the decisive cause of the accident were the defendant's negligence.

Causation
theory
preferred

The theory of causation is the predominant one at the present day and it is submitted that, upon the whole, it is the most satisfactory. It has been acutely criticised by Professor Bohlen (t) who says: "The modern view that legal causation depends on what is actually probable and natural, and that the mere wrongfulness of an existing act is *per se* immaterial, leaves even the case of successive negligences without support in the now existing principles of legal proximity of cause and effect." His contention is that causation deals with the relation of fact to facts as *facts* and has nothing to do with the merits and demerits of the authors who are litigating about them. This is no doubt true in many cases. If I negligently knock over and injure a man, I am liable to him whether he is going to a prayer meeting or to a thieves' kitchen. But, as was shown in § 20, *ante*, English law relating to causation in tort repeatedly takes into account the moral significance of a fact and not merely its existence as a fact. Scientifically it may be wrong in doing so, but law is not and cannot be an exact science.

If, however, we express a preference for the causation theory it is subject to the *caveat* that, with the authorities in their present condition, it would not be safe to transfer contributory negligence *en bloc* to the heading "Remoteness

(s) Selected Essays on the Law of Tort, 560.

(t) Studies in the Law of Torts, 511.

of causation, or damage" and to regard it as a mere species of the doctrines there; indeed, both contributory negligence and causation trail so many loose ends, historical and scientific, that no compact theory of either is as yet possible (*u*).

§ 125.

The doubts as to the completeness of the causation theory are exemplified by the following problem. A is travelling in B's vehicle. A collision occurs with C's vehicle owing partly to the negligence of C and partly to the contributory negligence of B. A, who is blameless throughout, is injured by the accident. C's negligence was the decisive cause of it. Now there is no doubt that A and B can successfully sue C for negligence. B can do so because although he himself was contributorily negligent, yet the decisive cause of the harm was the negligence of C. A can do so on the simple ground of C's negligence. There is equally no doubt that A can sue B for breach of contract if there was a contract of safe carriage on B's part. But, apart from contract, can A sue B for negligence? B's defence is, "I may have been contributorily negligent, but the decisive cause of your injury was C's negligence. Therefore I am not liable". A's retort to this is, "What is that to me? I am not concerned with any question of negligence between you and C. You owed a legal duty to me to take care. You have broken it. You are therefore liable".

Possible difficulties of it.

Now, if the causation theory of contributory negligence be pushed to its logical conclusion, A cannot recover against B; for the decisive cause of the accident was C's negligence, and scientifically it ought to remain the decisive cause for all purposes, whether it is B, A or anybody else who is injured. Yet it is not certain whether this is the law. In *The Bernina* (*a*), a collision occurred between the ships, *Bushire* and *Bernina*, owing to the negligent navigation of both vessels. A, a passenger on the *Bushire* was drowned. It was held by the House of Lords that the owners of the *Bernina* were liable for A's death; and the doctrine that passengers are "identified" with the negligence of the controller of the vehicle in which they are travelling (*b*) was overruled. This

(*u*) Cf. Salmond, Torts, § 124 (6); Holdsworth, Hist. of English Law, viii, 459—462.

(*a*) (1888), 13 App. Cas. 1.

(*b*) Laid down in *Thorogood v. Bryan* (1849), 8 C. B. 115.

§§ 125, 126.

was all that the case *decided*. It did not decide whether the owners of the *Bushire* would also have been liable for A's death; nor did it decide anything about contributory negligence, for here there was none because the negligence of *both* ships caused the accident. But a *dictum* of Lord Herschell (c) hints that A could have recovered against the *Bushire* even if the negligence of the *Bernina* had been the decisive cause of the accident and not the joint cause of it. And *dicta* in *Oliver v. Birmingham, etc., Omnibus Co.* (d), go farther still, but once again the action was not against B, the person in charge of A, the plaintiff, but against C, the other negligent party, and it is not entirely clear whether the Court regarded the case as one of joint negligence on the part of both B and C, or of negligence on C's part and contributory negligence on B's part (e).

Although the authorities on the point are not harmonious, the result of them seems to be that the defendant, in pleading contributory negligence, need not establish a duty on the part of the plaintiff to take care towards the defendant (f); it is enough for him to prove that the plaintiff failed to take ordinary care of himself. This would accord with principle, for the broad question in contributory negligence is, "Was it the plaintiff's own conduct that brought about his injury?"

§ 126. Rules of Contributory Negligence.

Rules of
contributory
negligence.

The Courts have worked out in some detail the rules relating to contributory negligence. The authorities are rather confused, but perhaps a fair statement of the result is this. The ultimate question is, "Who caused the accident?"

(1) If it were the defendant, the plaintiff can recover in spite of his own negligence.

(2) If it were the plaintiff, he cannot recover in spite of the defendant's negligence.

(c) 13 App. Cas., at p. 9.

(d) [1933] 1 K. B. 35. See, too, Greer, L.J., in *Sharp v. Avery*, [1938] 4 A. E. R., at p. 87.

(e) Cf. Pollock, Torts, 374—376. The problem is discussed at length in an anonymous brochure, *Negligence, Contributory Negligence and Damage sustained by a Third Party* (undated), Launceston, Tasmania. The learned author concludes that A has no action against B. We suggest that, on the authorities, the question is still an open one.

(f) Charlesworth, *Negligence* (2nd ed.) 464. In *Lewis v. Denye*, [1939] 1 K. B. 540, 554—555, du Parcq, L.J., regarded the proposition as settled in the C. A. The H. L., in affirming the C. A., [1940] A. C. 921, did not refer to the point.

(3) If it were both plaintiff and defendant, the plaintiff cannot recover at common law (for the Act of 1945, see p. 424, *post*).

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Rule (1) is illustrated by *Davies v. Mann* (g).

The plaintiff fettered the fore feet of his ass and turned it loose on the highway. This was an illegal act. The defendant, driving his wagon and horses at "a smartish pace" (*i.e.*, faster than he ought to have done in the circumstances) collided with and killed the ass. He was held liable to the plaintiff in an action for negligence despite the plaintiff's contributory negligence, because he might by the exercise of ordinary care have avoided the consequences of the plaintiff's negligence. This decision was approved by the House of Lords in *Radley v. L. & N. W. Ry.* (1876) (h), where the plaintiffs owned a railway siding with a bridge eight feet high over it. They negligently left on the siding a truck with a disabled truck piled upon it so that the joint height of the two amounted to eleven feet. The defendants' engine-driver was shunting a long line of trucks on the siding. He felt some obstruction and, instead of trying to ascertain what it was, put on steam. The obstruction was due to the fact that the piled-up truck had come in contact with the bridge and, being three feet too high for the span of it, could not pass under it. The extra impetus broke down the bridge. A new trial was ordered because the Judge had wrongly directed the jury that the plaintiffs must satisfy them that the accident had happened solely through the negligence of the defendants' servants.

Rule (1) also applies where the defendant has, by his own negligence, prevented himself from avoiding the result of the plaintiff's negligence. This appears from *Gish v. Columbia Electric Ry.* v. *Loach*, a Privy Council decision (i). One, Sands, was being driven in a wagon by X who, by the negligence of both himself and Sands, got the wagon on the railway company's level crossing when the company's train was approaching the crossing at the rate of thirty-five to forty-five miles an hour. The engine-driver first saw the wagon when the train was 400 feet from the crossing. He at

(g) (1842), 10 M. & W. 546. Criticised by W. Schofield in *Selected Essays in the Law of Tort*, 543-557.

(h) 1 App. Cas. 759 (W. Cases, 174). See, too, *McLean v. Bell* (1932), 147 L. T. 262.

(i) [1916] 1 A. C. 719 (W. Cases, 177).

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once applied his brakes. If they had been in good order, he could have stopped the train in 300 feet, but they were defective and the train therefore hit and killed Sands, whose representative sued the company. Now here the engine driver had done nothing negligent subsequent to Sands' negligent conduct, but owing to the company's earlier negligence the engine-driver was incapacitated from exercising such care as would have avoided the result of Sands' negligence; and the company was held liable.

Loach's Case has been adversely criticised, but with the amplification immediately to be stated (which indeed can be derived from the judgment itself) it seems to be a correct decision and has been approved by the House of Lords (*h*). It applies only (1) when the danger which led to the accident was, or ought to have been, apparent to the person who might have prevented the accident; and (2) when the group of events constituting the accident was such as to make that prevention possible if that person had not deprived himself of the opportunity of prevention, *i.e.*, when the events occurred in succession and with a sufficiently perceptible period of time between them to afford an opportunity of preventing the accident.

The first condition needs no comment. The second may be enlarged a little. If the engine-driver in *Loach's Case* had not had that perceptible and sufficient period of time in which he could have avoided the accident, the company would not have been liable, no matter how defective the brakes were, no matter how long they had been defective, no matter how negligent "in the abstract" the company had been. This must be so. You cannot in law hold a person responsible for negligence which is at present unrelated to any catastrophe. Nor can you hold him liable even when it is related to a catastrophe if it were not the decisive cause of it, if the accident would have happened quite apart from the fact that, at some antecedent moment outside the *catena* of events constituting the accident, he had been negligent. I may have had a defective brake on my car for a year on end, but I am liable to no one civilly until the car injures some one because I cannot stop it in time; and I am not liable even then if, assuming the brake to have been in good order, I should have

(*h*) *McLean v. Bell* (1932), 147 L. T. 262, 264.

had no opportunity of stopping it in time. It is nothing to the point that at a much earlier date I had had the *first* opportunity of avoiding the accident.

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Rule (2) is illustrated by *Butterfield v. Forrester* (*ante*, p. 412).

Rule (3) rests upon two decisions of the House of Lords.

Separation
of time,
place, or
circumstance

In *Admiralty Commissioners v. S.S. Volute* (1) they held that, in a maritime collision, even where the defendant's negligence is subsequent to that of the plaintiff, nevertheless the plaintiff's negligence is still contributory to the collision if there is not "a sufficient separation of time, place, or circumstance" between the plaintiff's negligence and the defendant's negligence to make the defendant's negligence the sole cause of the collision. The case itself was on the Maritime Conventions Act, 1911 (m), according to which (as will be seen below) damages are apportionable between the parties where both have been negligent; but in the later case of *Swadling v. Cooper* (n), the House regarded the decision in *The Volute* as of general application, and according to the Common Law the plaintiff in similar circumstances could have recovered nothing. That in fact was what happened in *Swadling v. Cooper*. X was negligently driving his car on a main road as he was approaching a side road which crossed the main road. He knocked over and killed a motor-cyclist who came out of the side road without warning, and who was therefore guilty of contributory negligence. The utmost limit of time between the moment when X could have seen the cyclist and the moment of impact was one second. The jury, in an action by the cyclist's widow against X, found that the substantial cause of his death was his contributory negligence.

One way of formulating Rules (1) and (2) is to embody them in the proposition that the party who caused the damage is he who had the last opportunity of avoiding it, or who would have had it but for his own negligence. In many cases this would be accurate, but it does not always follow that, because one of the parties had this last opportunity and did not take it, he is to be held solely to blame. This is exemplified by *The Eurymedon*, [1938] P. 41. *The*

(1) [1922] 1 A. C. 129, 144—145.

(m) 1 & 2 Geo. 5, c. 57, s. 1.

(n) [1931] A. C. 1, 10.

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Corstar was negligently anchored at night in the Thames nearly athwart the channel and thus obstructed a large part of the fairway. She was showing effective lights which might have been seen by *The Eurymedon*, who in that sense had the last opportunity of avoiding the collision which ensued. But, as those on board her were partially deceived as to the risk involved owing to the unexpected position of *The Corstar*, both vessels were held to blame. Again, Viscount Simon, in *Boy Andrew (Owners) v. St. Rognvald (Owners) (o)*, regarded the test of "last opportunity" as inaptly phrased and likely in some cases to lead to error; and Denning, J., has remarked extrajudicially that the practical effect of the Law Reform (Contributory Negligence) Act, 1945 (*post*, p. 424), "is that the doctrine of 'last opportunity' has largely disappeared. The Courts are no longer pressed to select, from various competing causes, what is the cause of the accident. Where the causes are numerous, as they often are, the Courts are free to state them, assess their respective influences and apportion the damages accordingly" (*p*).

Finally, neither here nor anywhere else in the law of tort do the Courts sternly adhere to pure logic in their investigation of what caused the accident. "The plaintiff's negligence". said Lord Wright, in *McLean v. Bell (q)*, "may be what is often called '*causa sine qua non*', yet as regards responsibility it becomes merely evidential or matter of narrative, if the defendant acting reasonably could and ought to have avoided the collision."

Dilemma
produced by
negligence.

Dilemma produced by negligence.—Where the defendant's negligence has put the plaintiff in a dilemma, the defendant cannot escape liability if the plaintiff in the agony of the moment, tries to save himself by choosing a course of conduct which proves to be the wrong one, provided the plaintiff acted in a reasonable apprehension of danger and the method by which he tried to avoid it was a reasonable one. If those conditions are satisfied he committed no contributory negligence. And the rule is equally applicable in favour of the

(o) [1948] A. C. 140, 149.

(p) 68 L. Q. R. 517–518.

(q) (1932) 147 L. T. 262, 264. So, too, *Loach's Case*, [1916] 1 A. C. at p. 727; *Admiralty Commissioners v. S.S. Volute*, [1922] 1 A. C. at p. 144.

defendant where there is contributory negligence on the part of the plaintiff which has forced the dilemma upon him instead of upon the plaintiff (r).

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Nowadays this is often referred to as "the rule in *The Bywell Castle*", a case decided in 1879 (s), where the Court of Appeal held that where one ship has by wrong manœuvres placed another ship in extreme danger, that other ship will not be held to blame if she has done something wrong and has not been manœuvred with perfect skill and presence of mind and has thus shared in causing her own damage. This was an Admiralty case and it has been repeatedly followed in shipping cases (t). But the principle is older than *The Bywell Castle* and applies generally to accidents whether at sea or elsewhere. It was laid down in *Jones v. Boyce* (1816) (u), where the plaintiff was a passenger on the top of the defendant's coach and, owing to the breaking of a defective coupling rein, the coach was in imminent peril of being overturned. The plaintiff, seeing this, jumped from it and broke his leg. In fact the coach was not upset. Lord Ellenborough, C.J., directed the jury that if the plaintiff acted as a reasonable and prudent man would have done, he was entitled to recover although he had selected the more perilous of the two alternatives with which he was confronted by the defendant's negligence; and the jury gave a verdict for the plaintiff. In fact, the reasonable man is only an ordinary man and the ordinary man is not likely to possess perfect presence of mind. But where all that the plaintiff is threatened with is mere personal inconvenience of a trifling kind, he is not entitled to run a considerable risk in order to get rid of it; e.g., if the door of a railway carriage in which he is travelling is so ill-secured that it keeps flying open, but he can avoid the draught by sitting elsewhere, it is his own fault if he falls out in trying to shut it (after several earlier unsuccessful attempts) while the tram is in motion (v).

Rule in
*The Bywell
Castle*

Upon the whole it would appear that the principle of *Jones*

Probably
applies
also to
property

(r) [1931] A C at p 9, *McLean v Bell* (1932), 147 L T 262, 263 (s) 4 P. D 219

(t) *Eg*, *United States of America v Laird Line, Ltd* [1924] A C 286, *Admiralty Commissioners v S S Volute*, [1922] 1 A C 129, 136 See, too, Lord Blackburn in *Stoomvaart Maatschappij Nederland v P & O S N Co* (1880), 5 App Cas 876, 891 and Brett, L J, in *Woodley & Co v Mitchell & Co* (1883), 11 Q B D 47, 52-53

(u) 1 Stark 493 (W Cases, 180)

(v) *Adams v L & Y Ry* (1869), L. R 4 C. P. 739.

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v. Boyce applies to attempts to preserve one's property from injury, as well as one's life and limbs. *Clayards v. Dethick* (w) shows that a man is not bound to refrain from carrying on his business merely because some danger created by the defendant obstructs him in doing so; unless the danger was out of reasonable proportion to the risk which he himself undertook, or unless he had been precisely warned of the danger. The plaintiff, C, was a cab proprietor whose stables were in mews which communicated with the street only by a passage thirteen and a half feet wide. The defendants cut and left open a trench in the passage six and a half feet wide. This left a path four and a half feet wide on one side of the trench and two and a half feet wide on the other. The defendants had made the path which was four and a half feet wide still more difficult by heaping rubbish on it. C wished to get his horses to the street and was directed by one of the defendants to lead out one horse over the four and a half feet path. He succeeded in this, but while he was trying to do the same thing later with another horse when the defendants were not there, the rubbish gave way and the horse fell into the trench and was injured. The defendants were held liable. The case was adversely criticised by Lord Bramwell both judicially and extra-judicially (a), but most of his strictures were on mere verbal points and there are expressions by another Judge in which *Clayards v. Dethick* was approved (b); moreover, the decision seems to be a sensible one.

Much more recently Lord Sumner was of opinion that the rule relating to alternative danger refers to personal peril and has not been extended to danger to property (c), but this strikes one as too sweeping a view. It seems sounder to say that a man is less likely to be behaving reasonably if he runs a great risk to save, not himself, but his property; but that it does not follow that he must never undertake any risk for that purpose, still less that if it is presented to him in the form of

(w) (1848), 12 Q. B. 439.

(a) *Lax v. Corporation of Darlington* (1879), 5 Ex. D. 28, 35—36; *McMahon v. Field* (1881), 7 Q. B. D. 591, 594; and he enlarged his views in Appendix B to Horace Smith's *Law of Negligence* (2nd ed. 1884). See, too, Wills, J., in the Court of first instance in *Thomas v. Quartermaine* (1886), 17 Q. B. D. 414, 417; no notice of his dictum was taken by the Court of Appeal: 18 Q. B. D. 685.

(b) Montague Smith, J., in *Adams v. L. & Y. Ry.* (1869), L. R. 4 C. P. 739, 743.

(c) *S.S. Singleton Abbey v. S.S. Paludina*, [1927] A. C. 16, 28—29

a dilemma he is without a remedy if he chooses what turns out to be the more perilous course. The test is, "Would a prudent person have done what he did?" And the answer to that will necessarily vary with the circumstances of each case.

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Whether the plaintiff's injury were decisively caused by his contributory negligence must of course be ascertained from the evidence. If the Judge is of opinion that it was so caused then he must not allow the case to go to the jury (*d*), and it is quite possible that the plaintiff's own evidence may justify this course without any necessity for calling upon the defendant's evidence (*e*).

Rules of evidence.

In directing the jury there is no need for the Judge to expound the whole law of contributory negligence; it is enough if he tells them that part of it which is essential to a clear understanding by them of the issue which they have to decide (*f*). The tendency of the Courts is perhaps against laying down hard-and-fast rules on points of detail. It was laid down in at least four decisions of the Court of Appeal that if the driver of a vehicle goes so fast in the dark that he cannot pull up within the limits of his vision, that will prevent him from recovering damages if he collides with anything else (*g*). But in two later decisions the same Court declined to regard this as a general principle however correct it may have been for the purpose of deciding the earlier cases upon their particular facts (*h*).

So far we have dealt with the Common Law relating to contributory negligence. An important statutory modification of it is the Maritime Conventions Act, 1911 (*i*), section 1 of which provides that where, by the fault of two or more vessels, damage or loss is caused to one or more of them, to their cargoes or freight, or to any property on board, the liability to make good the damage or loss shall be in proportion to the degree in which each vessel was in fault; but that if, having regard to all the circumstances of the case, it is impossible

Maritime Conventions Act, 1911.

(*d*) *Sharpe v. S. Ry.*, [1925] 2 K. B. 311.

(*e*) *Baker v. Longhurst & Sons, Ltd.*, [1933] 2 K. B. 461, 468—9. See G. C. Tilley in 51 Law Quarterly Review (1935), 500—512.

(*f*) *Swadling v. Cooper*, [1931] A. C. 1.

(*g*) *Baker v. Longhurst & Sons, Ltd.*, [1933] 2 K. B. 461, 465, note (1). So, too, *Tart v. Chitty & Co.*, [1933] 2 K. B. 453.

(*h*) *Tidy v. Battman*, [1934] 1 K. B. 319; *Morris v. Luton Corporation*, [1946] K. B. 114. See, too, the decision of the Judicial Committee in *Stewart v. Hancock*, [1940] 2 A. E. R. 427.

(*i*) 1 & 2 Geo. 5, c. 57. For the history of earlier legislation, see Marsden, *Collisions at Sea* (9th ed. 1934), Chap. II.

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to establish different degrees of fault, the liability shall be apportioned equally. No vessel is to be liable for any loss or damage to which her fault has not contributed.

The Act applies to all vessels, to all waters and to proceedings in all Courts (*k*). Where loss of life or personal injuries are suffered by any person on board a vessel owing to the fault of that vessel and of any other vessel or vessels, the liability of the owners of the vessels shall be joint and several, subject to any defence which, independently of the Act, could have been pleaded to an action for the death or personal injury inflicted (*l*).

It will be noticed that the Act is principally concerned with the apportionment of liability. It throws very little light on what constitutes liability and here we have to fall back upon the Common Law rules as to contributory negligence which we have already expounded and, as stated in the leading textbook on maritime collisions, they do not appear to differ from accidents occurring on land (*m*).

Act of 1945

The Law Reform (Contributory Negligence) Act, 1945 (*n*), applies the principle on which the Maritime Conventions Act, 1911 (*o*) was based to contributory negligence in general. The extension was recommended by the Law Revision Committee in 1939 (*p*) and was urgently needed, for the Common Law rule which gave the plaintiff all or nothing often operated unfairly, especially in cases of motor accidents on the highway in which a pedestrian or cyclist was injured; for, if his claim against the driver of the motor vehicle failed owing to his own contributory negligence, he usually had no policy of insurance to fall back upon. The Act (section 1 (1)) provides that "Where any person suffers damage as the result partly of his own fault and partly of any other person or persons (*q*), a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to

(*k*) Marsden, *op. cit.*, 139—140.

(*l*) S. 2 of the Act.

(*m*) Marsden, *op. cit.*, 32—33; *S.S. Heranger v. S.S. Diamond*, [1939] A. C. 94.

(*n*) 8 & 9 Geo. 6, c. 28. The Act applies to Scotland subject to the qualifications stated in s. 5. For a decision on the Act, see *Jay & Sons v. Veivers*, [1946] 1 A. E. R. 646.

(*o*) The Act of 1911 is unaffected by the Act of 1945.

(*p*) Cmd. 6032.

(*q*) By s. 1 (3), the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (*ante*, p. 169), is made applicable where two or more persons are liable.

such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage"} Section 4 provides that "'damage' includes loss of life and personal injury". There is no doubt that it also includes injury to property, for that was the law before the Act (r). Section 4 also defines "fault" as "negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from the Act, give rise to the defence of contributory negligence". The Act, therefore, does not alter the existing law as to determining whether or not there has been contributory negligence; all that it does is to alter the law as to the damages recoverable where contributory negligence is established. The Act provides that any defence arising under a contract is unaffected. With respect to the Workmen's Compensation Acts, 1925—1943, the Act, after a somewhat chequered career in Parliament, was extended to these subject to conditions which are too detailed to set forth here; but this part of the Act was repealed by the National Insurance (Industrial Injuries) Act, 1946, which repealed and replaced most of the Workmen's Compensation Acts (*ante*, § 32). As to procedure, the Court must find and record the total damages which would have been recoverable if the claimant had not been at fault; if the case is tried with a jury, they assess the amount of the total damages and also the extent to which they are to be reduced (section 1 (2), (6)).

We have already discussed the question whether contributory negligence is a defence to a breach of a statutory duty owed by an employer to his employee (*ante*, p. 141). Apart from that, is this defence pleadable to a breach of any other statutory obligation? The answer is that each statute must be construed on its own merits. It may possibly be cast in such terms as to negative the defence altogether. On the other hand, the statutory duty of a railway company to fence its track from the highway may be so framed as not to exclude the defence (s), and the validity of the plea has been exemplified in decisions on other kinds of statutory duty (t). In

Statutory
duty.

(r) The word "includes" in a statute may have either of two significations; they are specified in *Dilworth v. Commissioners of Stamps*, [1899] A. C. 99, 105—106.

(s) *Ellis v. L. & S. W. Ry.* (1857), 2 H. & N. 424. Cf. *Parkinson v. Gorstang, etc. Ry.*, [1910] 1 K. B. 615, where there was no contributory negligence.

(t) *R. v. Southern Canada Power Co., Ltd.*, [1937] 3 A. E. R. 923, 930; *Joseph Eva, Ltd. v. Reeves*, [1938] 2 K. B. 393.

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Criticisms of
the law.

particular, the Court of Appeal has settled it that contributory negligence may be a defence to an action founded upon a breach of statutory regulations relating to pedestrian crossings on a highway (u).

The Common Law of contributory negligence has been adversely criticised. As it started with no clear principle it has yawed first on this tack and then on that in its efforts to find one, and although the causation theory is now the one generally preferred there are several older cases which are irreconcilable with it, and even at the present day the idea of moral responsibility cannot be excluded. Upon the whole the Judges work out the theory as well as can be expected of any attempt to take account of causation in law as distinct from treating it in metaphysics.

(u) *Sparks v. Edward Ash, Ltd.*, [1943] K. B. 223. *Chisholm v. L. P. T. B.*, [1939] 1 K. B. 426. *Obiter dicta* in *Bailey v. Geddes*, [1938] 1 K. B. 156, had created the mistaken impression that the driver of a vehicle, who, owing to his breach of such a regulation, had injured a pedestrian at a crossing, was liable no matter how foolhardy or inattentive the pedestrian had been; but that is not the law, although the regulations unquestionably impose a high standard of care on the driver; cf. *Upton v. L. P. T. B.*, [1947] 1 K B 930.

CHAPTER XVII

CONSPIRACY (a).

§ 127. *History*.—In our early law conspiracy had the narrow meaning of combination to abuse legal procedure. This sort of thing is very much commoner in an unsettled or primitive state of society than in a fully civilised community. In time past great men often used the law for gaining their own private ends and would mobilise witnesses, jurors and sometimes Judges for that purpose just as they would mobilise their men-at-arms and tenants for the battle-field. The earliest civil remedy (allowing for the difficulty of distinguishing civil from criminal redress in those days) for conspiracy was the writ of conspiracy which is probably to be attributed to the Statute of Conspirators of 20 or 21 Edw. 1 (b). The writ was not applicable unless there were both combination and execution of the purpose of the agreement. Mere combination might suffice for criminal conspiracy, but not for civil liability (c). In Tudor times the writ fell into obsolescence partly because those monarchs made vigorous use of the law of maintenance for crushing abuse of legal procedure, partly because an action upon the case in the nature of conspiracy was coming into fashion in Elizabeth's reign. This developed into the action for malicious prosecution (d). Meanwhile, from the fourteenth century onwards, conspiracy on its criminal side steadily increased in range. We read in the Parliament Rolls of combinations for treasonable purposes, for purposes injurious to the revenue and (much the most frequent variety) for restraint of, or interference with, trade. In the latter half of the seventeenth century, the scope of criminal conspiracy swiftly approached the wide meaning that

(a) Monographs on the topic are Winfield, *History of Conspiracy and Abuse of Legal Procedure* (1921); R. S. Wright, *Criminal Conspiracies* (1873); D. Harrison, *Conspiracy* (1924). See also A. L. Haslam, *Law relating to Trade Combinations* (1931), Chap. II; W. P. M. Kennedy and J. Finkelman, *The Right to Trade* (1933), Toronto.

(b) The date is uncertain. Coke's attribution of the writ to the Common Law seems to have been based on an imaginative passage in *Mirror of Justices* (Coke, 2 Inst. 561; *ibid.* 383); Winfield, *op. cit.*, 22—37.

(c) Winfield, *op. cit.*, 64—65.

(d) *Ibid.*, Chap. V.

§§ 127, 128. it now has. But its development as a tort was much slower and by more hesitant steps, and there is little case law upon it until the latter part of the nineteenth century (e). Then trade disputes stimulated its growth because concerted action became a more and more potent weapon for inflicting deadly blows on a commercial rival. Decisions have been practically confined to combinations to interfere with trade or business, and this applies to the recent case of *Crofter Hand Woven Harris Tweed Co. v. Veitch* (f), but dicta of great weight in that decision of the House of Lords justify the inference that combinations to do other acts may be conspiracies.

Definition.

§ 128. *Definition.* When two or more persons combine for the purpose of inflicting upon another person an injury which is unlawful in itself, or which is rendered unlawful by the mode in which it is inflicted, and in either case the other person suffers damage, they commit the tort of conspiracy.

It is only since *Veitch's Case* (*supra*) that any definition could be hazarded, for three earlier decisions of the House of Lords in 1898, 1901, and 1925 (g) had left open several points. Before we consider them, we must refer to two decisions in the lower Courts.

The cases considered.

One was *Gregory v. Duke of Brunswick* (1844) (h), in which the plaintiff, an actor, sued the defendants for maliciously conspiring to hoot and hiss him at his performance of Hamlet in Covent Garden Theatre. The substance of the case was entangled with procedural points but the decision amounted to this. Hissing at a theatre is *prima facie* a lawful act. If done maliciously by one person it might possibly be a tort. Here the plaintiff first of all put the whole weight of his claim upon combination by the defendants, but he was unable to establish that all of them had combined and the jury returned a verdict for the defendants. Then the plaintiff contended that at any rate he was entitled to judgment against each of those whom he alleged to have hissed maliciously, but here he failed again because the only evidence of malice which he could produce was some insulted acts on the part of individuals. If the case shows anything it is

(e) *Ibid.*, Chap. IV.

(f) [1912] A. C. 435 (W. Cases, 182).

(g) *Allen v. Flood*, [1898] A. C. 1; *Quinn v. Leathem*, [1901] A. C. 495; *Sorrell v. Smith*, [1925] A. C. 700

(h) 6 M. & G. 205, 953; the decisions on appeal were on procedural points; 3 C. B. 481; 2 H. L. C. 415.

that malice may perhaps convert an innocent act like hissing into a tort and that one way of proving such malice is to show combination among those who hiss; but it must be admitted that later judicial *dicta* attached a much wider interpretation to *Gregory's Case* (i).

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The other case was *Huttley v. Simmons* (k), a decision of Darling, J., in 1897. He held that a combination to do an act otherwise lawful did not become unlawful merely because of the combination; but see now p. 433 (2), *post*.

We can now consider how the House of Lords have dealt with the matter, and five decisions must be examined: *Mogul Steamship Co. v. McGregor, Gow & Co.*, [1892] A. C. 25; *Allen v. Flood*, [1898] A. C. 1; *Quinn v. Leathem*, [1901] A. C. 495; *Sorrell v. Smith*, [1925] A. C. 700; *Veitch's Case*, [1942] A. C. 435.

The first of these was clear enough. The defendant steamship companies wished to monopolise the China tea-carrying trade. They therefore combined together to offer reduced freights in order to induce shippers to employ them. In consequence the Mogul S.S. Co., who had been excluded from the combination, were driven out of the trade, and they brought an action for conspiracy against the defendants. It was held that the plaintiffs had no cause of action, for the object of the defendants was merely to protect and to extend their trade and to increase their profits and they had used no unlawful means in achieving it. "What one trader may do in respect of competition, a body or set of traders can lawfully do; otherwise a large capitalist could do what a number of small capitalists, combining together, could not do, and thus a blow would be struck at the very principle of co-operation and joint-stock enterprise" (l).

Mogul S.S. Case.

The next case, *Allen v. Flood* (m), so far as its actual decision went, had nothing to do with conspiracy. What was held by the majority of the House was that an act lawful in itself is not converted into a tortious act by a malicious or

Allen v. Flood.

(i) Lord Halsbury, L.C., in *Allen v. Flood*, [1898] A. C. 1, 11, and in *Quinn v. Leathem*, [1901] A. C. 495, 503. Lord Esher, M.R., in *Temperton v. Russell*, [1893] 1 Q. B. 715, 728—729. Lord Cave, L.C., in *Sorrell v. Smith*, [1925] A. C. 700, 712.

(k) [1898] 1 Q. B. 181. Lord Lindley in *Quinn v. Leathem*, [1901] A. C. 495, 540, complained that the report did not state the most material facts.

(l) Lord Morris, at p. 50.

(m) [1898] A. C. 1; *post*, § 169.

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*Quinn v.
Leathem.*

bad motive; and this was an application of their decision in *Bradford (Mayor of) v. Pickles* (n). *Allen v. Flood* did not affect the law of conspiracy, but it was much discussed and “explained” in *Quinn v. Leathem* (o), a case which itself became a thicket of problems. The facts of it were as follows. The defendants were five officials of a trade union, the Butchers’ Association. L was a flesher who employed non-union men. L had sold £80 worth of meat weekly for twenty years to Munce, a butcher, but there was no binding contract between L and Munce for the continued supply of meat. The defendants told Munce to stop taking meat from L. Munce accordingly told L to send no more meat until L had settled his dispute with the trade union. L’s servants, in breach of their contracts of employment, also left L in consequence of the demands of the defendants.

L sued the defendants. The trial Judge left the following questions to the jury (p): (1) Did the defendants, or any of them, wrongfully and maliciously induce the customers or servants of L to refuse to deal with L? (2) Did the defendants, or any two or more of them, maliciously conspire to induce L’s customers or servants not to deal with L or not to continue in his employment; and were such persons so induced not to do so? (3) Did the defendants, or any of them, publish “black lists” with intent to injure L in his business; and, if so, did the publication injure him?

To each of these questions the jury replied “Yes”; and they returned a verdict for £200 damages in respect of heads (1) and (2) and £50 in respect of (3). Judgment was entered for those amounts. The Irish Court of Appeal affirmed the judgment for £200, but disallowed the award of £50 because the “black list” was only one of the overt acts of the conspiracy and distinct damages could not be given for it (q). The House of Lords unanimously affirmed the judgment of the Court of Appeal; but it is impossible to say what proportion of weight must be attached by the decision as a whole to each of heads (1) and (2). Much more obscure is the

(n) [1895] A. C. 587 (W. Cases, 16); *ante*, § 20.

(o) [1901] A. C. 495.

(p) [1899] 2 Ir. R. 667, 671.

(q) [1899] 2 Ir. R. 746—779.

effect of the decision on the law of civil conspiracy, for variant opinions were expressed as to this (r).

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In the years following *Quinn v. Leatham* the text-books and the decisions of some of the Courts gradually showed a decided tendency to regard that case as resting not upon the ground of conspiracy, but upon unlawful coercion. However, *dicta* in *Veitch's Case* unhesitatingly regarded it as conspiracy (s).

In *Sorrell v. Smith* (t) a trade union of retail newsagents wished to limit the number of retail newspaper shops in a particular area. They sought to do this by procuring members of their union to buy no newspapers from any wholesale newsagent who supplied newspapers to a retailer opening a new shop without the union's permission. The plaintiff, a member of the union, was a customer of R, a wholesale agent.

Sorrell v. Smith.

R offended the union by supplying papers to newcomers in the area who had set up retail shops without the union's consent. The union told the plaintiff to cease dealing with R. He obeyed and transferred his custom to W, another wholesale agent. Thereupon the defendants, a committee of proprietors of newspapers who regarded the union's policy as injurious to them, came to R's assistance. They tried to compel the plaintiff to return to R by threatening to stop supplies to W. They acted for the sole purpose of protecting their trade and they had no spite against the plaintiff or any desire to injure him. The plaintiff sued in the Chancery Division for an injunction to restrain the defendants, whether in combination or otherwise, from procuring or attempting to procure a breach of contract between him and W, or from interfering or attempting to interfere with the plaintiff's right to enter into

(r) Lord Macnaghten, [1901] A. C., at pp. 510—511. A combination to injure another person resulting in damage is a tort. Numbers may make an act unlawful which would otherwise be lawful.

Lord Shand (at pp. 512—513). A combination (i) to advance the combiners' own trade interests is lawful; (n) merely to injure another is unlawful.

Lord Brampton (at pp. 528—531). Conspiracy is an unlawful combination to do an unlawful act or to do that which is wrongful or harmful (whether unlawful in itself or not).

Lord Robertson (at p. 532, adopting Holmes, L.J.'s, reasoning in [1899] 2 Ir. R., at pp. 771—779). Conspiracy is a combination to do an unlawful act or a lawful act by unlawful means.

Lord Lindley (at pp. 536—540). Combination to do a lawful act is not unlawful, but numbers may be a proof of coercion and, if that coercion is unlawful, an action will lie.

(s) [1942] A. C. 466 (Lord Wright); 490 (Lord Porter).

(t) [1925] A. C. 700.

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or to continue contractual relations with W, or generally with his right to carry on his business as he would (u).

The House of Lords unanimously held that the action failed because the defendants had not committed or threatened to commit any wrong. With respect to conspiracy what they actually decided was:—

(1) A combination of two or more persons for the purpose of injuring a man in his trade is unlawful and, if it results in damage to him, is actionable.

(2) If the real purpose of the combination is not to injure another, but to forward or defend the trade of the combiners, no tort is committed, provided the purpose is not effected by illegal means.

Thus it was clear that within the narrow limits of (1) conspiracy is a tort. But *Sorrell v. Smith* gave no satisfactory information on the question whether, in general, combination can make an injury tortious which, apart from combination, would not be tortious; for the Lords differed markedly, perhaps irreconcilably, on this question. Whatever answers they gave were *obiter dicta*, however great their weight, for their decision lay within the narrow compass which we have stated (a).

Later *dicta* did not help much in the interpretation of *Sorrell v. Smith* (b) until *Veitch's Case* which we must now consider.

*Veitch's
Case.*

In *Crofter Hand Woven Harris Tweed Co., Ltd. v. Veitch* (c), the facts were as follow. The production of Harris tweed is an industry of the Isle of Lewis. Originally the yarn

(u) [1923] 2 Ch. 32, 33.

(a) [1925] A. C. 700, 713—714, 740—741. Lord Cave, L.C., and Lord Atkinson (who merely concurred in Lord Cave's speech) hinted, and Lord Sumner expressed an opinion, that combination is relevant only as evidence—but important evidence—of the purpose of the defendants and as an aggravation of damages, though it by no means follows that every combination is a form of intimidation. Lords Dunedin and Buckmaster seemed to be opposed to this. Lord Buckmaster agreed with Lord Dunedin that it is quite possible for combination to make illegal an act which, if done by an individual, would be legal. Both of them indicated that no combination can be a civil conspiracy unless it be also a criminal conspiracy and that even then it is not tortious unless damage be proved: Lord Dunedin, at pp. 725—726. Lord Buckmaster was presumably in agreement by his adoption of Lord Dunedin's speech, at p. 749. It is well known to criminal lawyers that exactly what purpose will make a combination criminal is unsettled.

(b) *Hardie & Lane, Ltd. v. Chilton*, [1928] 2 K. B. 306, 313, 327; *Scammell, Ltd. v. Hurley*, [1929] 1 K. B. 419; *Clark v. Urquhart*, [1930] A. C. 28, 51—52, 76.

(c) [1942] A. C. 435 (W. Cases, 182).

of the cloth was hand-spun from wool by the crofters of Lewis and was wholly produced in the Isle. By 1930, hand-spinning of wool had become commercially impracticable and thenceforth many of the weavers in Lewis imported yarn from the mainland. Five mill-owners in Lewis nevertheless spun yarn woven by the crofters. These mill-owners alleged that cloth woven on Lewis from mainland yarn could be sold much more cheaply than cloth made from yarn spun in Lewis. It was therefore to their interest to get a minimum price fixed for the cloth. Of the workpeople in their mills 90 per cent. were members of the Transport and General Workers Union, and the Lewis dockers were also members of it. The union, with the object of getting all workpeople in the mills to be members of the union and of increasing their wages, approached the mill-owners who replied that they could not raise wages because of the competition of the crofters who wove yarn imported from the mainland. The union officials then put an embargo on the importation of yarn by ordering the Lewis dockers not to handle such yarn. They obeyed (without breaking any contract) and thus injured the trade of seven small producers of tweed who used imported yarn and who sued the union officials for conspiracy. The case did not involve any point under the Trade Disputes Act, 1906 (*ante*, p. 112), for the union officials were sued merely as individuals. The House of Lords held that they were not liable because the real purpose of their embargo was to benefit members of the union. The actual decision was thus based upon the *ratio decidendi* of *Sorrell v. Smith*, but several of the Lords investigated conspiracy as a tort and from their *dicta* the following inferences may be made :

(1) Damage to the plaintiff is an essential of the tort. This was already well settled.

(2) Combination may make an act a tortious conspiracy, although if done by one person it would not be unlawful. It had long been clear law that a combination wilfully to injure another person by means unlawful in themselves is a tortious conspiracy. It was also well recognised in *Sorrell v. Smith* that, if the combination were solely to injure wilfully another person in his trade, this is tortious even if the damage would not have been tortious if inflicted by an individual. But *dicta*

§ 128.

in *Veitch's Case* (d) went farther in indicating that if the object of the combination were wilfully to injure a person in any legitimate interest of his, it would, unless there were lawful justification for it, be a tortious conspiracy (e). Some of the Lords adverted to the reasons why combination should ever make an otherwise lawful act unlawful (f). They did not regard as entirely satisfactory Lord Lindley's idea in *Quinn v. Leatham* that "numbers may annoy and coerce where one may not" (g) and indeed counsel in that case had urged that "some men are a host in their individual selves: are lions; some multitudes are asses: e.g., Napoleon: Bismarck: and the nations whom they crushed" (h). Sir Frederick Pollock added to these examples more modern ones, e.g., Rockefeller or Carnegie, and he also noted that, on the other hand, a corporation, however powerful, is an individual before the law (i). There is no doubt, however, that historically Lord Lindley's reason is correct (*ante*, § 127).

(3) If the purposes of the combination are mixed, the question is, "What was the predominant purpose?" (k).

(4) Malice, meaning spite or ill-will, is not an essential of liability (l); but if such malice be proved and the combiners had not in view any tangible benefit to themselves, that would be a conspiracy (m).

(d) Viscount Simon, L.C., [1942] A. C. 446—447; Lord Wright, at pp. 462, 478; and perhaps Lords Maugham and Porter, at pp. 451, 488.

(e) In the *Mogul Case* (1889), 23 Q. B. D. 598, 618, Bowen, L.J., put examples of combination making an otherwise lawful act a conspiracy; A, B and C agree to drink up all the water from a common spring in time of drought, or to buy up in time of scarcity all the provisions in a district.

I suppose that a combination to make a woman a prostitute or a boy a thief (as in Dickens' *Oliver Twist*) would be a combination to do something tortious in itself. In the case of the woman the tort might be intentional infliction of harm as in *Wilkinson v. Downton*, [1897] 2 Q. B. 57 (*ante*, § 68). *Oliver Twist* would have had an action for deceit against Fagin.

(f) Viscount Simon, L.C., [1942] A. C. 443; Lord Wright, at pp. 467—468; Lord Porter, at p. 489.

(g) [1901] A. C. 495, 538.

(h) [1901] A. C. 503—504.

(i) Torts, 258, note (x). But this metaphysical individuality of a corporation aggregate is no obstacle to suing it for conspiracy, for it must act by agents. Thus, if a conspiracy is perpetrated by the directors of a limited company, the plaintiff can sue them, joining the company as a co-defendant, and if the conspiracy was committed in the course of their employment the company would be liable as well as they: Palmer, *Company Law* (16th ed. 1938), 60, 189.

(k) Viscount Simon, L.C., [1942] A. C. 445; Lord Wright, at p. 478; inferentially, Lord Maugham, at pp. 453, 456.

(l) Lord Maugham, *ibid.*, 451; Lord Wright, *ibid.*, 468—469.

(m) Lord Wright, *ibid.*

(5) It is probably not law that what is unlawful in two is not lawful in one (n). § 128.

As the definition of conspiracy indicates, the combination may be either to do an act unlawful *per se*, or to do an act otherwise lawful, by unlawful means. If the injured party, in suing the defendants, bases his claim on one of these alternatives, he cannot subsequently maintain a second action based on the other alternative (o).

(n) Lord Wright, *ibid.*, 466. In the first edition of this book it was pointed out that, although there was much to be said in favour of the opposite view, the current of authority in the House of Lords itself was too strongly against it; that seems to have been Lord Wright's opinion.

(o) *Greenhalgh v. Mallard*, [1947] 2 A. E. R. 225 (C. A.). Nor is an action for conspiracy maintainable against A and B when judgment has been given in their favour on substantially the same facts in an action for fraudulent misrepresentation: *Wright v. Bennett*, [1948] 1 A. E. R. 227.

CHAPTER XVIII

NUISANCE (a).

§§ 129, 130.

Definition.

§ 129. Nuisance is incapable of exact definition (b), but for the purposes of the law of tort it may be described as *unlawful interference with a person's use or enjoyment of land, or of some right over, or in connexion with it* (c).

History.

§ 130. (d). *History*.—Derivatively the word “nuisance” is the Latin *nocumentum* and the French *nuisance* (e) and it acquired a specific legal meaning very early in the history of our system. Bracton had a good deal to say about *nocumenta*. Some of these he described as *damnosa* but not *injuriosa* and men must bear them as best they may. But where *nocumenta* are *injuriosa* as well as *damnosa* they are all injuries to “*servitudes*” and are the subject of legal complaint (f). Here we might hastily infer that Bracton gives us the touchstone of nuisances and that they were merely infringements of easements and *profits à prendre*. Unfortunately the ground is less solid than it appears to be, for he had looser ideas about the meaning of a “servitude” than we have. He included under it not only easements and *profits à prendre* but also what would now be styled “common rights” or “*natural rights*”, i.e., the freedom of a man to do what he likes on his own land. Bracton regarded this freedom as conferring on the tenant of land a “servitude” to redress “nuisance” or harm done by his neighbour to his enjoyment of his land (g). Hence originated a confusion of

(a) The leading monographs are Pearce & Meston, *Nuisances* (1926), and Garrett, *Nuisances* (3rd ed. 1908).

(b) Garrett, *op. cit.*, 4; Pearce & Meston, *op. cit.*, 1; 24 *Laws of England* (Halsbury, 2nd ed.), § 30.

(c) Adopted by Scott, L.J., in *Read v. Lyons & Co., Ltd.*, [1945] K. B. 216, 236; by Lord Goddard, C.J., in *Howard v. Walker*, [1947] 2 A. E. R. 197, 199; and by Evershed, J., in *Newcastle-under-Lyme Corporation v. Wolstanton, Ltd.*, [1947] Ch. 92, 107 (his *dictum* on this point was not affected by the appeal, [1947] Ch. 427, 467–468). For other definitions see Pollock, *Torts*, 319; Salmond, *Torts*, § 53 (2); Clerk & Lindsell, *Torts*, 544.

(d) This section is taken from the author's article on “Nuisance as a Tort” in 4 *Cambridge Law Journal* (1931), 189–206.

(e) Pollock & Maitland, *H. E. L.*, ii, 534, n. 2.

(f) *De legibus Angliae*, fol. 231 b–235 b.

(g) *Op. cit.*, 220 b–221.

servitudes *stricto sensu* with common rights which, as Sir William Holdsworth pointed out (*h*), is traceable in the Year Books and indeed throughout our legal history until the nineteenth century. The confusion cleared away only by degrees, for the distinction was grasped, but not firmly, in 1625 (*i*), and two more centuries elapsed before it was sharply perceived (*k*). This is by no means a complaint that nuisance ought to have been confined, or ought now to be confined, exclusively to servitudes strictly so-called, or exclusively to infractions of common rights, but Bracton's breadth of terminology made the separation of these two ideas a tough affair for the Judges of a later day, and if common rights be such as a man can exercise on his own land for the enjoyment of it, it is obviously difficult to say what is comprised in such a cloudy phrase. This is reflected in early attempts to define nuisance quite as much as in modern ones (*l*). The best that Blackstone could do with it was "any thing done to the hurt or annoyance of the lands, tenements, or hereditaments of another" (*m*), but even then he had more to say in another chapter entitled "Of Disturbance" about matters some of which are now classified as nuisances (*n*).

The history of the remedies for nuisance may be briefly stated.

(1) *The assize of nuisance*.—This was supplementary to the famous assize of novel disseisin which was limited to redressing any act of the defendant that interfered with the plaintiff's seisin of land. It was therefore useless if the injury to the plaintiff began wholly on the defendant's land (*e.g.*, if he erected there a dam which diverted water from the plaintiff's land), for the injury was not a disseisin as there was no entry on the plaintiff's land. This gap was filled by the assize of nuisance as early as the thirteenth century. It extended both to injuries to servitudes *stricto sensu* and to common rights (*o*).

(*h*) H. E. L., vii, 328—333.

(*i*) *Sury v. Pigot*, Popham 166.

(*k*) *Elliotson v. Feetham* (1835), 2 Bing. N. C. 134; *Bliss v. Hall* (1838), 4 Bing. N. C. 183; *St. Helen's Smelting Co. v. Tipping* (1865), 11 H. L. C. 642 (W. Cases, 193).

(*l*) *E.g.*, Finch, Law (1629), 187—188.

(*m*) Comm., iii, 216.

(*n*) *Ibid.*, iii, Chap. XVI.

(*o*) Bracton, cc. 44, 45; fol. 232 *seq.* His earlier statements are not clear, but c. 45 seems to justify the epitome in the text.

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(2) *Abatement* was also a remedy which was known at an early stage of our law, for Bracton speaks of it (*p*). The modern limits of it have already been noticed (*q*).

(3) The action *quod permittat prosternere*.—If the land on which the nuisance was created was alienated, the plaintiff could sue this action, the writ in which commanded the defendant to allow the plaintiff to abate the nuisance. It was in the nature of a writ of right and was therefore open to the infinite delays appropriate to that form of procedure (*r*). Both it and the assize of nuisance were abolished after a long period of obsolescence by the Real Property Limitation Act, 1833 (*s*).

(4) *The writ of trespass*.—It is hard to ascertain how far, if at all, this was a remedy for nuisance. We shall consider the point later in distinguishing nuisance from trespass.

(5) *Action upon the case for nuisance*.—This became the sole Common Law action. Its advantages over the assize of nuisance and the *quod permittat prosternere* were its simpler process and the absence of any requirement that the parties should be freeholders. Its disadvantage was that it lay only for damages, not for abatement, as did the older remedies, and unless the successful plaintiff resorted to Equity he might have to raise the *posse comitatus* (*t*) to get rid of a nuisance which an obstinate and ill-natured neighbour refused to remove (*u*). The action was known as early as Henry IV's reign (*a*).

(6) *Injunction*.—In Equity, the Court could in its discretion issue an injunction to restrain this among other torts. In the case of nuisance it seems to have been recognised as a remedy at least as early as 1584 (*b*). The general principles

(*p*) De legibus Angliæ, f. 231 b. See Holdsworth, H. E. L., iii, 279.

(*q*) *Ante*, § 34.

(*r*) It is not clear when it was introduced. Coke's theory (2 Inst 405) that it was in existence before the Statute of Westminster II, 1285 (13 Edw. I), c. 24, is probably untenable; 4 Camb. Law Journ. 191.

(*s*) 3 & 4 Will. 4, c. 27, s. 36.

(*t*) The "power of the county" which includes the aid and attendance of all able-bodied knights and laymen above the age of fifteen within the county.

(*u*) Blackstone, Comm., iii, 222.

(*a*) It is referred to in Y. B. Mich. 2 Hen. 4, f. 11, pl. 48; Brooke, Abridgment, Act Sur le Cas, 29; and Y. B. Mich. 11 Hen. 4, f. 25, pl. 48. Cf. Holdsworth, H. E. L., iii, 27–28.

(*b*) *Osborne v. Barter*, Choyce Cases in Chancery, 176. Claim dismissed because plaintiff, after exhibiting his bill in Chancery, elected to bring an assize of nuisance. Another early case is *Swayne v. Rogers* (1604), Cary 26, where one reason for granting the expeditious procedure by injunction

on which it will be granted nowadays have been already considered (c). It is, of course, not now confined to the Chancery Division. §§ 130, 131.

The older Year Books do not narrate as much litigation about nuisances as one would expect, but borough Courts could deal more promptly and cheaply than the King's Courts with a species of wrong which must always be commoner where buildings are aggregated than in the open country (d).

To sum up: the existing remedies are (1) abatement; (2) injunction; (3) damages.

§ 131. Public and private nuisances.

Public and
private
nuisances.

Nuisances are divided into public and private, although it is quite possible for the same conduct to amount to both. A public or common nuisance is one which affects the public and is an annoyance to the King's subjects generally; a private nuisance is one which injures a private person, exclusively or else in some way which the law regards as in excess of the annoyance suffered by the public at large. This distinction is vague and it has been rightly said that nuisance "covers a multitude of ill-assorted sins" (e). Some writers (f) have therefore insisted that there is really nothing in common between some public nuisances and private nuisances. What generic conception, it has been asked, connects public nuisances like the woman who is a common scold, the man who keeps a brothel, or the boy who fires a squib, with private nuisances like blocking up the ancient lights of a building or excessive playing on the piano? The only link which we can suggest is inconvenience and, loose as this term is, it is probably the best that can be offered. At any rate, be the ground of the distinction what it may, the distinction itself cannot be cast aside without departing from settled legal terminology and ignoring not only the fact that a public nuisance may become a private one but also the

was that the plaintiff was "a professor of law, who sought thereby to avoid multiplicity of suits".

(c) *Ante*, § 36.

(d) In London in the thirteenth century, an assize of twelve aldermen with the mayor could settle within a week disputes about fences between lands and blocking up the entrance to a shop or house. In Ipswich, pleas of nuisance were in certain circumstances free from the troublesome delay of essoins. Borough Customs, 18 S. S., vol. I, 245-249, 254. See, too, *Leet Jurisdiction in Norwich*, 5 S. S. 56.

(e) Pearce & Meston, *op. cit.*, 1.

(f) *E.g.*, Salmond, *Torts*, § 53 (1).

§§ 131, 132.

Special
damage
necessary
for private
nuisance.

very practical consequence of the distinction, which is that a public nuisance is a crime while a private nuisance is only a tort.

So long as the public only or some section of it is injured no civil action can be brought for nuisance (g). Where a public highway is obstructed I cannot sue the obstructor for nuisance if I can prove no damage beyond being delayed on several occasions in passing along it and being obliged either to pursue my journey by a devious route or to remove the obstruction, for these are inconveniences common to every one else. The best reason for the rule is that it prevents multiplicity of actions, for if one were allowed to sue, a thousand might do so and this would lead to harsh results. If, for instance, a public body obstructed a highway temporarily for the purpose of draining, paving or lighting it and it was then discovered that owing to some technical error they had no authority to do so, they would be sufficiently punished by a criminal prosecution (h). But where any person is injured in some way peculiar to himself, then the nuisance becomes a private one and he can sue in tort; as where he falls into a trench unlawfully opened in a street and breaks his leg. So in *Rose v. Miles* (i), the defendant wrongfully moored his barge across a public navigable creek and thereby obstructed it so that the plaintiff, who had begun a journey on the creek with his barges before the obstruction was made, was obliged to unload them and to incur considerable expense in transporting their cargoes by land; and it was held that the nuisance was a private one with respect to him and that he could recover damages (k).

Nuisances to
servitudes.

§ 132. *Nuisances to servitudes*.—In our historical sketch (§ 130) it was noted that nuisance may signify not only interference with the enjoyment of property generally but also interference with easements and *profits à prendre*, like

(g) The Attorney-General may, on the information of a private individual, maintain an action for nuisance: Robertson, *Civil Proceedings* by and against the Crown, 472. For the principle and history of this, see Blackstone, Comm. iv, 303—308; Holdsworth, H. E. L., ix, 236 *et seq.*

(h) *Winterbottom v. Lord Derby* (1867), L. R. 2 Ex. 316.

(i) (1815), 4 M. & S. 101. See, too, *Medcalf v. Strawbridge, Ltd.*, [1937] 2 K. B. 102.

(k) If he knew that the obstruction had occurred before he began the voyage he would have been in no worse position than the general public: per Lord Ellenborough, C.J., 4 M. & S. at p. 103. The leading case is *Iveson v. Moore* (1699), 1 Ld. Raym. 486. In *Ricket v. Metropolitan Ry* (1865), 5 B. & S. 156, 159—160, the Exch. Chamber summarised the law.

obstruction of a right of way or a right of light or a right of pasture. That is the law at the present day (l), but we do not propose to deal with injuries to servitudes in this book, partly for considerations of space, partly because the topic is quite as much in the province of Real Property law as in that of Tort (m). §§ 132, 133.

§ 133. Essentials of nuisance.—(1) Interference.

Essentials of nuisance.

There must be interference with the use or enjoyment of land, or of some right over or in connexion with it, causing damage to the plaintiff.

(1) *Interference*.—The forms of this are innumerable. Noise, smells, pollution of air or water, are the most usual instances, but there are many others (n). The two main heads are injury to property and interference with personal comfort. The escape of fumes, which kill vegetation and cattle, is an illustration of the first (o), and excessive tolling of church bells of the second (p). But whatever be the type, it does not follow that any harm constitutes a nuisance. The whole law on the subject really represents a balancing of conflicting interests. Some noise, some smell, some vibration, every one must endure in any modern town, otherwise modern life there would be impossible. It is repeatedly said in nuisance cases that the rule is *sic utere tuo ut alienum non lædas*, but the maxim is not very informative. If it means that no man is ever allowed to use his property so as to injure another, it is palpably false. If it means that a man in using his property may injure his neighbour but not if he does so unlawfully, it is not worth stating. In fact, the law repeatedly recognises that a man may use his own so as to injure another without committing a nuisance. It is only if such use is unreasonable that it becomes unlawful. The homely phrases, "Give and take", "Live and let live" are much nearer the truth than the Latin maxim. (1) Interference.

Where the interference is with personal comfort, it is not necessary in order to establish a nuisance that any injury to health should be shown. It is enough that there is a material

(l) Sir John Salmond thought not, but his learned editor, Dr. Stallybrass, has rightly declined to follow his author here: Torts, § 53 (2).

(m) There is an excellent succinct account of this kind of nuisance in Salmond, Torts, §§ 60–68.

(n) 24 Laws of England (Halsbury, 2nd ed.), §§ 46–58.

(o) *Manchester Corporation v. Farnworth*, [1930] A. C. 171.

(p) *Soltau v. De Held*, (1851), 21 L. J. Ch. 153

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interference with the physical comfort of human existence reckoned "not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people" (g).

Reasonable-
ness.

Reasonableness.—One of the chief tests is reasonableness and it is important to distinguish this term in the law of nuisance from its use elsewhere in the law of tort, especially in negligence. In negligence, assuming that the duty to take care has been established, the vital question is, "Did the defendant take reasonable care?" But in nuisance the defendant is not necessarily quit of liability even if he has taken reasonable care. It is true that the result of a long chain of decisions is that unreasonableness is a main ingredient of liability for nuisance. But here "reasonable" means something more than merely "taking proper care". It signifies what is legally right between the parties, taking into account all the circumstances of the case, and some of these circumstances are often such as a man on the Clapham omnibus could not fully appreciate. It is putting a comparatively simple proposition before him to tell him that he is liable for negligence if he carelessly drives his car against another person; but it is not so simple to tell him that, while he can make some noise on his premises, he must not make too much, or he will be liable for nuisance. Knocking a man down carelessly is a tort *simpliciter*; making a noise that irritates him is a tort only *sub modo*.

Thus it must often be a pure gamble whether I act lawfully in opening a particular business in a street. If I make an error of judgment in deciding whether the business is offensive or not, I shall not escape liability by proving that I took all reasonable care to prevent the business from being a nuisance (r). This is far short of saying that taking care is irrelevant to liability for nuisance. If the defendant has conducted his trade or business in a proper manner, *i.e.*, as a reasonable man would have done, he has gone some of the way towards making out a defence, but only some of the way (s); and, conversely, he will be in danger of being held

(g) Knight-Bruce, V.-C., in *Walter v. Selfe* (1851), 4 De G. & Sm. 215, 222.

(r) Lindley, L.J., in *Rapier v. London Tramways Co.*, [1833] 2 Ch. 355, 390.

(s) *Stockport Waterworks Co. v. Potter* (1861), 7 H. & N. 160.

liable if he has taken no such reasonable care (t). But even where he has given proof of it, he will still be liable if there has been a sensible (i.e., unreasonable) amount of damage caused to the plaintiff. He will also be liable if he has taken over from another person property on which existed a nuisance (u), but not for the act of a trespasser in creating the nuisance unless he could reasonably have known of it, and here again "reasonable care" is a relevant matter (a).

"Reasonableness" thus plays an important part in determining whether or not there has been a nuisance. But it will not do to leave to the jury the bare question, "On the facts, has the defendant acted like a reasonable man?" (b). Much more in the way of detail is needed than that, as appears in the judgment of the Exchequer Chamber in *Bamford v. Turnley* (c) and in the direction of Mellor, J., in *St. Helen's Smelting Co. v. Tipping*, which is the *locus classicus* on the point (d). Moreover, the *St. Helen's Case* affirmed an important distinction between nuisances producing material injury to property and nuisances inflicting personal discomfort. With respect to the latter, a town-dweller must put up with "the consequences of those operations of trade which may

(t) *May v. Stoop* (1909), 25 T. L. R. 262; *Manchester Corporation v. Farnworth*, [1930] A. C. 171.

(u) *Broder v. Saillard* (1876), 2 Ch. D. 692.

(a) *Barker v. Herbert*, [1911] 2 K. B. 633, especially Vaughan Williams, L.J., at pp. 636-637; this case was followed by Scrutton, L.J., in *St. Anne's Well Brewery Co. v. Roberts* (1929), 140 L. T. 1, 7. See, too, *Ilford U. D. C. v. Beal*, [1925] 1 K. B. 671; *Smith v. G. W. Ry.* (1926), 135 L. T. 112. *Humphries v. Cousins* (1877), 2 C. P. D. 239, is not inconsistent, for it was really an application of *Rylands v. Fletcher* (1868), L. R. 3 H. L. 330; *Ilford U. D. C. v. Beal*, [1925] 1 K. B. at pp. 667-678. The principle in *Barker v. Herbert* was amplified in *Sedleigh-Denfield v. O'Callaghan*, [1940] A. C. 880, *post*, p. 460.

(b) This was what the Judge went near doing in *Hole v. Barlow* (1858), 4 C. B. (N.S.) 334, and perhaps that is why *Bamford v. Turnley* (next note) has been regarded as overruling it. But it is hard to discover exactly what the Judges in later cases objected to in *Hole v. Barlow*, or why they regarded *Bamford v. Turnley* as overruling it, or how much of *Hole v. Barlow* is overruled.

(c) (1862), 3 B. & S. 66; 31 L. J. Q. B. 286.

(d) (1863), 4 B. & S. 608, 616; 11 H. L. C. 642 (W. Cases, 193). "Every man is bound to use his own property in such a manner as not to injure the property of his neighbour, unless, by the lapse of a certain period of time, he has acquired a prescriptive right to do so. But the law does not regard trifling inconveniences: every thing must be looked at from a reasonable point of view: and therefore, in an action for nuisance to property by noxious vapours arising on the land of another, the injury to be actionable must be such as visibly to diminish the value of the property and the comfort and enjoyment of it. . . . In determining that question the time, locality, and all the circumstances should be taken into consideration."

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be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large" (e). But where the injury is to property, the rule is stricter (f). This distinction is not free from difficulties which have been considered elsewhere (g).

Sensitive-
ness.

Sensitiveness.—In considering what is reasonable the law does not take account of abnormal sensitiveness in either persons or property. If the only reason why a man complains of fumes is that he has an unusually sensitive nose or that he owns an exotic flower, he cannot expect any sympathy from the Courts.

Heath v. Brighton (Mayor of) (h) exemplifies the point as to persons. The incumbent and trustees of a Brighton church sought an injunction to restrain noise from the defendants' electrical power station. There was no proof of diminution of the congregation or of any personal annoyance to any one except the incumbent and he was not prevented from preaching or conducting his services; nor was the noise such as to distract the attention of ordinary healthy persons attending the church. An injunction was not granted.

Robinson v. Kilvert (i) illustrates the point as to property. The defendant began to manufacture paper-boxes in the cellar of a house the upper part of which was in the occupation of the plaintiff. The defendant's business required hot and dry air and he heated the cellar accordingly. This raised the temperature on the plaintiff's floor and dried and diminished the value of brown paper which the plaintiff warehoused there; but it did not inconvenience the plaintiff's workmen nor would it have injured paper generally. It was held that the defendant was not liable for nuisance. "A man who carries on an exceptionally delicate trade cannot complain because it is injured by his neighbour doing something lawful on his property, if it is something which would not injure anything but an exceptionally delicate trade" (k).

Temporary
injury.

Temporary injury.—What importance, if any, is to be attached to the fact that the injury is a temporary one? On

(e) Lord Westbury, L.C., 11 H. L. C., at p. 650. See, too, *Polsue & Alfieri, Ltd. v. Rushmer*, [1909] A. C. 121.

(f) See the quotation in note (d), *supra*.

(g) W. Cases, 195—197.

(h) (1908), 98 L. T. 718.

(i) (1889), 41 Ch. D. 88.

(k) Lopes, L.J., *ibid.*, 97.

this question there is a certain amount of inconsistency to be found in text-books and in some judicial *dicta*; but the law seems to be this.

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In the first place, there is abundant authority to show that if the plaintiff is claiming an injunction to restrain a nuisance, it will not be issued, except in extreme cases, if the nuisance is temporary and occasional only. The reason for this is that an injunction is a remedy depending on the discretion of the Court and it will not be issued where damages would be an adequate remedy. The rule was illustrated in *Swaine v. G. N. Ry.* (l), where manure heaps which were ordinarily inoffensive were occasionally rendered offensive by tardiness in their removal and also by the presence of dead cats and dogs; and the Court of Chancery declined to grant an injunction, leaving the plaintiff to his Common Law action for damages. An instance of the exceptional "extreme case" in which the Court did grant an injunction was pile-driving carried on by night for building purposes; for to do it at that time was unreasonable (m).

Next, where the claim is for damages, as distinct from an injunction, the duration of the alleged nuisance appears to be one—but only one—of the relevant factors in determining whether the defendant is liable (n).

It seems to be a mistake, then, to concentrate attention solely upon the fact that the injury happens to be temporary; all other circumstances must be taken into account and they may on the one hand make a temporary annoyance a nuisance or, on the other, render it lawful. A man who pulls down his house for the purpose of building another no doubt causes considerable inconvenience to his neighbours and it may well be that he will take some months in the process; but if he uses all reasonable skill and care to avoid annoyance, that is not a nuisance, for life could scarcely be carried on if it

(l) (1864), 4 De G. J. & S. 211, 215—216, where Turner, L.J., stated the rule. He and Lord Cranworth had anticipated it in *Att.-Gen. v. Sheffield Gas Co.* (1852), 3 De G. M. & G. 304, and it was applied in *Att.-Gen. v. Cambridge Gas Co.* (1868), L. R. 4 Ch. 71; *Gosnell v. Aerated Bread Co., Ltd.* (1894), 10 T. L. R. 661, and *Att.-Gen. v. Preston (Mayor of)* (1896), 13 T. L. R. 14.

(m) *De Keyser's Royal Hotel, Ltd. v. Spicer Bros., Ltd.* (1914), 30 T. L. R. 257.

(n) *Per Pollock, C.B.*, in *Bamford v. Turnley* (1862), 3 B. & S. 66, 79; 31 L. J. Q. B. 286, 292 (a dissenting judgment, but certainly not on this point); Bramwell, B.'s, expression at p. 294 is too wide.

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were (o). On the other hand, blocking up a highway for no more than a month may well be a nuisance because circumstances will usually make the resulting damage so much more serious (p). Indeed, when the damage is of a serious character the fact that the event which caused it was momentary is not material. In *Midwood & Co., Ltd. v. Manchester (Mayor of)* (q) an electric main installed by the defendants fused. This caused an accumulation and explosion of gas from which a fire broke out and the plaintiffs' goods were injured in consequence. The defendants were held liable and the argument that a sudden accident could not properly be styled a nuisance was brushed aside.

Thus, when it is said that the injury must be "of a substantial character, not fleeting or evanescent" (r), apparently what is signified is that the temporary nature of the injury may be evidence, but certainly not conclusive evidence, that it is too trivial to be reckoned as a nuisance (s).

Malice.

Malice.—Is malice material in nuisance? If A's use of his own property causes to B annoyance which does not amount to a nuisance, will the fact that A's acts are done solely for the purpose of annoying B convert them into a nuisance? There are some *dicta* (t) and at least two decisions which show that evil motive has this effect in some types of nuisance.

In *Christie v. Davey* (u), the defendant, exasperated by a considerable amount of music lessons given by the plaintiff, a teacher of music whose residence was separated from that of the defendant only by a party-wall, interrupted the plaintiff's lessons by knocking on the party-wall, beating on trays, whistling and shrieking. North, J., issued an injunction because the defendant had acted deliberately and maliciously for the purpose of annoying the plaintiff. The learned Judge added: "If what has taken place had occurred between two sets of persons both perfectly innocent, I should have taken

(o) *Vaughan Williams, J., in Harrison v. Southwark and Vauxhall Water Co.*, [1891] 2 Ch. 409, 413—414. Cf. *Andreae v. Selfridge & Co., Ltd.*, [1938] Ch. 1.

(p) *Jocson v. Moore* (1699), 1 Ld. Raym. 486

(q) [1905] 2 K. B. 597.

(r) *Brett, J., in Benjamin v. Storr* (1874), L. R. 9 C. P. 400, 407

(s) Cf. *Fritz v. Hobson* (1880), 14 Ch. D. 542, 556.

(t) *Bramwell, B., in Bamford v. Turnley* (1862), 31 L. J. Q. B. 286, 294. *Lord Selborne, L.C., in Gaunt v. Fynney* (1872), L. R. 8 Ch. 8, 12.

(u) [1893] 1 Ch. 316.

an entirely different view of the case" (a). Two years later, however, the House of Lords in *Bradford (Mayor of) v. Pickles* (b) laid it down that a bad motive cannot make wrongful an act otherwise legal, and they reaffirmed this principle in *Allen v. Flood* (c); but in neither decision was any reference made to *Christie v. Davey*.

Macnaghten, J., followed *Christie v. Davey* in *Hollywood Silver Fox Farm, Ltd. v. Emmett* (d), where the defendant deliberately caused guns to be fired off on his own land near the boundary of the plaintiff's land in order to scare the plaintiff's silver foxes during breeding-time. The vixens of these animals are extremely nervous during breeding-time and much damage was done in consequence of the defendant's act, which was one of pure spite due to a squabble between himself and the plaintiff. The learned Judge granted an injunction and also awarded damages.

These decisions are reconcilable with *Bradford v. Pickles* on the ground that the malice displayed by the defendants made their acts "unreasonable" in the sense explained on pp. 442—444, *ante*, and therefore nuisances. The element of unreasonableness in nuisance as a tort had been recognised long before *Bradford v. Pickles* and that decision did not affect the principle in nuisances of this type (e), *i.e.*, those in which the law recognises that a certain amount of discomfort is inevitable in life owing to the activities of one's neighbours, but also expects that neighbours by their mutual forbearance will lessen this discomfort as much as they are reasonably able; and of mutual forbearance there was not a trace in either *Christie v. Davey* or the *Hollywood Case* (f).

(a) [1893] 1 Ch. 326—327.

(b) [1895] A. C. 587 (*ante*, p. 61).

(c) [1898] A. C. 1.

(d) [1936] 2 K. B. 468, 475 (W. Cases, 197).

(e) But in nuisances which are injuries to servitudes, malice is irrelevant to liability.

(f) It is true that the injuries committed by the defendant in *Pickles' Case* were not only abstraction of water percolating through unknown and undefined channels between his own land and that of the plaintiffs, but also pollution of the water which percolated from his land to the plaintiffs'; and that the plaintiffs claimed a remedy for pollution as well as diminution of the water: [1893] 3 Ch. 53, 60—61; and so far the claim looks like one for nuisance. But the C. A. and the H. L. entirely ignored this side of it and confined their attention to the claim in respect of the diminution. On the other hand, some text-books have gone too far the other way in regarding Lord Watson's speech (at p. 598) as indicating that malice is irrelevant in the law of nuisance. In fact, his remarks referred to Scots law; they threw no light on English law. For discussion as to the basis of the

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It is necessary to add that there are many instances of nuisance in which the defendant will be held liable even if he had no evil motive. All that the cases just considered show is that in some circumstances an evil motive may turn otherwise innocent conduct into a nuisance; they certainly do not show that malice is an invariable essential of nuisance. In that respect malice in the law of nuisance differs from malice in a tort like malicious prosecution, where it is impossible for the plaintiff to succeed unless he does prove malice.

Highways.

Nuisances to highways (g).—We must here speak first of the duty to repair the highway. At Common Law it is on the inhabitants of the parish at large, but Highway Acts have in general transferred it to various local authorities like urban and rural district councils. The contents of the duty cannot be detailed here except to note that, although an indictment will lie for non-repair of a highway, no action is maintainable by an individual who is injured in consequence of it. If the injury is due to some act, as distinct from omission, by the highway authority, then he can sue (*h*).

No liability for non-feasance.

The distinction between misfeasance and nonfeasance in this connexion is an old one (*i*). The chief reason for it was that if an action had been allowed for nonfeasance and damages awarded there would have been great difficulty in levying them against those responsible for repair—the inhabitants of the county—not to speak of the injustice of making persons liable who had become such inhabitants before the damage was done or who had migrated elsewhere after it had occurred (*k*). When the duty of repair was transferred to

Hollywood Farm Case, see 52 L. Q. R. (1936), 460—461; 53 L. Q. R. (1937), 1—4. My learned friend, Mr. Fraser Roberts, suggested to me another distinction between *Pickles' Case* and the *Hollywood Case*. In the former, the act of the defendant, apart from malice, was not a tort of any sort, while in the latter circumstances might well have made the act a nuisance, malice or no malice.

(*g*) A full account of the law is in Pratt & Mackenzie's *Law of Highways* (18th ed. 1932), Chap. V; see also Pearce & Meston, *op. cit.*, Chap. VI.

(*h*) The leading authorities are collected in G. E. Robinson, *Public Authorities* (1925), 82—97. A railway company under a duty to maintain a road is liable for omissions as well as for acts: *Swan v. S. Ry.*, [1939] 2 K. B. 560. As to fences, see 16 Halsbury, *Laws of England* (2nd ed.), 313—314, and *Casleley v. Bristol Corporation*, [1944] 1 A. E. R. 14.

(*i*) *Y. B. Pasch.* 5 Edw. 4, f. 2, pl. 24; Brooke, *Abr.*, *Action sur le Case*, 93.

(*k*) *Russell v. Men of Devon* (1788), 2 T. R. 667. Coleridge, J., in *M'Kinnon v. Penson* (1854), 9 Ex. 609, 612—614. This reasoning, it might be objected, was equally applicable to misfeasance and yet there was liability for that; and, it must be admitted that very little help is obtainable from the older reports for clearing up this difficulty. Actions for nuisance by mis-

corporate local bodies the procedural difficulty of multiplicity of defendants disappeared and it might have been thought that the rule itself could be dropped, but it was retained because the Courts took the view that the statutes which had effected the transfer had in general created no new liability but had only set up a more convenient method of enforcing existing rights (l).

The law on this point is therefore settled, but some of the Judges, while admitting this, have rightly criticised the distinction between misfeasance and nonfeasance (m), and the tendency of recent decisions is to construe "nonfeasance" narrowly. Here, as elsewhere in our system, the distinction has caused some litigation and led to rather artificial results, but that is inevitable, for the difference between act and omission can easily be turned into a metaphysical discussion and the Courts have wisely avoided this and have tended to treat each case on its peculiar facts (n). In *Thompson v. Brighton (Mayor of)* (o) the defendants were both sewer and road authority for Brighton. In the first capacity they made and kept in good repair the cover of a manhole in the highway. In the second capacity they allowed the road surrounding this cover to wear down so that the cover projected above the surface of the road and the plaintiff's horse stumbled on the projection, fell and was injured. The defendants were held not liable because mere omission to keep the road in repair had been their only fault. Contrast with this *Shoreditch (Mayor of) v. Bull* (p), where X was both sanitary and

feasance against those who were bound to repair the highway are of the rarest occurrence. None is traceable in Viner, Abridgment, under the titles, Nuisance or Chimin. It may be that their scarcity was due to the fact that the obstruction would nearly always be caused by a contractor or servant employed by the authority and ideas of vicarious responsibility had not then reached their modern development. Later still, the doctrine was adopted that where the duty of the authority was discharged gratuitously there was no vicarious responsibility at all on its part: *Holliday v. St. Leonard's, Shoreditch* (1861), 11 C. B. (N.S.) 192; but this was overruled in *Mersey Docks Trustees v. Gibbs* (1866), L. R. 1 H. L. 93.

(l) *Cowley v. Newmarket Local Board*, [1892] A. C. 345.

(m) The C. A. in *Thompson v. Brighton (Mayor of)*, [1894] 1 Q. B. 332, 337, 344, and Humphreys, J., in *Guilfoyle v. Port of London Authority*, [1932] 1 K. B. 336, 346. So, too, the Judicial Committee in *Borough of Bathurst v. Macpherson* (1879), 4 App. Cas. 256, 267; but they explained away the dicta there in their later decision in *Municipal Council of Sydney v. Bourke*, [1895] A. C. 433.

(n) For a courageous attempt to discover a more exact test, see Robinson, *op. cit.*, 183—184.

(o) [1894] 1 Q. B. 332.

(p) (1904), 90 L. T. 210.

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road authority and dug a trench in the highway for the purpose of laying a sewer but filled it up imperfectly on one side of the road. The plaintiff, driving his cab by night, crossed to the other side of the road in order to avoid this unsafe part and ran into a heap of rubbish. It had been placed there by some trespasser but X knew of its existence and had not lighted or fenced it. X was held liable, his conduct being misfeasance (q).

We can now deal with obstruction of the highway in general. Of course every such obstacle is not a nuisance, for the highway would be scarcely usable if it were. The repair of the water, gas and electric mains which run under the street, of the surface of the street itself, and the building and alteration of the houses bordering on it, all constitute lawful occasions, either under statutory powers or by the Common Law, for temporary interference with its free passage and its amenities (r). And if shops and houses are to get any supplies, vehicles and persons must pause on the highway to deliver them. A temporary obstruction, provided it is reasonable in amount and duration, is permissible (s). Whether it is so is a question of fact varying with the circumstances of each particular case. Nor is every permanent obstruction a nuisance (t). These propositions are elementary but they need stating because extremists have argued on the one hand that the highway can never be obstructed and on

(q) Other examples are *Nicholson v. S. Ry.*, [1935] 1 K. B. 558; *Shilton v. Epsom, etc. U. D. C.*, [1937] 1 K. B. 112; *Polkinghorn v. Lambeth B. C.* (1938), 158 L. T. 127; *Newsome v. Darton U. D. C.* (1938), 54 T. L. R. 945; *S. & R. Steamships, Ltd. v. L. C. C.* (1938), 61 Ll. L. Rep. 9; *Drake v. Beds. C. C.*, [1940] K. B. 620; *Simon v. Islington B. C.*, [1943] K. B. 188 (where it was also pointed out that immunity for nonfeasance will not cover omissions which concern the highway, but not as a highway; in this case the highway authority had taken over a disused tramway and had taken no steps to rid the highway of the danger caused by the derelict trams; they were held liable for the consequent death of a cyclist); *Lewis v. Burnett*, [1945] 2 A. E. R. 555. As to the duty of a railway company with respect to repair of a road, see *Swain v. S. Ry.*, [1939] 2 K. B. 560.

(r) *Pratt & Maekenzie, op. cit.*, Part I, Chap. V.

(s) *Harper v. Haden & Sons, Ltd.*, [1933] Ch. 298, 304. *Almeroth v. W. E. Chivers & Sons, Ltd.*, [1948] 1 A. E. R. 53 (pedestrian on highway is not obliged to keep his eyes on the ground to see whether there is any obstruction there). See Professor Goodhart in 6 Camb. L. J. 161-174 (Public Meetings and Processions). Whether an unlighted vehicle on the highway in the dark is, or is not, a nuisance is purely a question of fact depending on the circumstances of the case: cf. *Ware v. Garston Haulage Co., Ltd.*, [1944] K. B. 30; *Maitland v. Raisbeck*, [1944] K. B. 689; and *Clarke v. Brims*, [1947] 1 K. B. 497.

(t) *Att.-Gen. v. Wilcor*, [1938] Ch. 934.

the other hand that obstruction can never give rise to an action for nuisance (*u*).

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If the injured person suffers no special harm, if his plight is no worse than that of other users of the highway, he has no cause of action. *Rose v. Miles* (*ante*, p. 440) exemplifies this; there it was held that there was special damage.

Loss of
custom.

The principle has never been questioned but its judicial application has provoked some differences of opinion not easily reconcilable, and this is markedly so with respect to loss of custom by a tradesman owing to an unlawful obstruction. In *Wilkes v. Hungerford Market Co.* (1835) (*a*) a bookseller who proved that his customers had been diverted from him in this way was awarded damages. But a majority of the Court of Exchequer Chamber in *Ricket v. Metropolitan Ry.* (1865) (*b*) regarded the decision as probably wrong, apparently on the ground that consequential loss of custom was too remote because it did not directly interfere with the use of the highway by the injured party, his servants, agents or tenants; and when *Ricket's Case* reached the House of Lords grave doubts as to the validity of *Wilkes' Case* were expressed by Lord Chelmsford, L.C., and Lord Cranworth (*c*). In two later cases, moreover, *Ricket's Case* was taken to have overruled *Wilkes' Case* (*d*). Yet in both these later cases it was held that interference with an easement of light was sufficient special damage arising from the highway obstruction to support an action, and such damage appears to be just as direct or indirect as loss of custom. The plaintiff's personal use of the highway is hindered neither more nor less in the one case than in the other. Further, in *Fritz v. Hobson* (1880) (*e*) unreasonable obstruction of a private way leading from the highway to the house and shop of a dealer in antiques was held to be actionable because it resulted in loss of custom to him (*f*). Hence, the view of the Exchequer Chamber in *Ricket's Case* is a narrow one and a reaction has

(*u*) *Fritz v. Hobson* (1880), 14 Ch. D. 542, 552. See p. 405, note (*d*), *ante*.

(*a*) 2 Bing. N. C. 281.

(*b*) 5 B. & S. 156, 160—162.

(*c*) L. R. 2 H. L. 175, 188, 199.

(*d*) Willes, J., in *Beckett v. M. Ry.* (1867), L. R. 3 C. P. 82, 100; Montague Smith, J., in *Eagle v. Charing Cross Ry.* (1867), L. R. 2 C. P. 638, 650.

(*e*) 14 Ch. D. 542

(*f*) Cf. *Vanderpant v. Mayfair Hotel Co., Ltd.*, [1930] 1 Ch. 138.

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set in in favour of *Wilkes' Case* which, be it noted, has never been actually overruled. In *Blundy, Clark & Co. v. L. & N. E. Ry.*, Greer, L.J., and *semble* Scrutton, L.J., regarded it as correctly decided (g), and so did Lord Hanworth, M.R., in *Harper v. Haden & Sons, Ltd.* (h). Perhaps it is a fair inference that obstruction causing loss of custom is a private nuisance provided that it is not suffered by every one in the neighbourhood (i).

Somewhat akin to obstruction of this kind is the monopoly of a pavement by a theatre queue. A queue as such is perhaps not unlawful even if its occupation of the pavement makes foot-passengers deviate or access to shops difficult. It is only when it is unreasonable that the proprietors of the theatre which causes it are liable for nuisance; e.g., where the queue was at times five deep, extended far beyond the theatre itself and remained there for very considerable portions of time, it was held to be a nuisance to the plaintiffs, whose premises were adjacent to the theatre (k). The defendant is not liable if, although the queue was one of prospective customers at his shop, he was not responsible for it because other circumstances (e.g., shortage of supplies in consequence of war) were the primary cause of it; nor will he be liable unless the plaintiff can prove damage (l): but the defendant is liable if the obstruction by means of the queue is due to an unusual method of conducting business; e.g., by the sale of ice-cream from a window of the shop instead of inside the shop (m).

Projections.

Projections over the highway.—These deserve special mention because the law is to some extent unsettled. It is clear that the mere fact that something (e.g., a tree, a clock, a sign, an awning or a corbel) projects over the highway from land or a building adjacent to it constitutes no private nuisance. This must be so, for no conceivable damage is done to any one and there is scarcely a garden or a building on the edge of the highway which would not have to be altered if the law were otherwise (n). The rule is different

(g) [1931] 2 K. B. 334, 352, 362; *contra*, Slessor, L.J., at p. 372.

(h) [1933] Ch. 298, 306—307. Lawrence, L.J., preferred to express no opinion (p. 315).

(i) Cf. Pollock, Torts, 321—322; Salmond, Torts, § 69 (7).

(k) *Lyons, Sons & Co. v. Gulliver*, [1914] 1 Ch. 631; *diss.* Phillimore, L.J. The C. A. approved *Barber v. Penley*, [1893] 2 Ch. 447, where North, J., examined the authorities in detail.

(l) *Dwyer v. Mansfield*, [1946] 1 K. B. 437.

(m) *Fabri v. Morris*, [1947] 1 A. E. R. 315.

(n) *Noble v. Harrison*, [1926] 2 K. B. 332, 337 (W. Cases, 200).

where the projection is over private property because the rights of the proprietor of it are much wider than the limited right of the user of a highway (*o*). If damage is done owing to the collapse of the projection on the highway or by some other mischief traceable to it, the occupier of the premises on which it stood is liable if he knew of the defect or ought, on investigation, to have known of it. At any rate that is the rule with respect to a thing that is naturally on the premises, *e.g.*, a tree. In *Noble v. Harrison* (*p*) a branch of a beech tree growing on X's land overhung the highway and in fine weather suddenly broke and fell upon Y's vehicle passing along the highway. Neither X nor his servants knew that the branch was dangerous and the fracture was due to a latent defect undiscoverable by any reasonably careful inspection. Y claimed damages from X (1) for nuisance, or alternatively (2) under the rule in *Rylands v. Fletcher* (*q*) for the escape of a dangerous thing from X's land. He failed on both grounds; as to (1) for the reason stated above; as to (2) because the tree was not in itself a dangerous thing and to grow trees is a natural use of one's land.

With respect to artificial things (*e.g.*, a lamp) which project and do damage there is a conflict of judicial opinion as to the precise nature of the liability for it. According to one view the duty is no greater than that with respect to natural projections (*r*); according to another view it is a strict one analogous to that formulated in *Rylands v. Fletcher* which would make the occupier of the premises liable even in the absence of negligence (*s*). In *Tarry v. Ashton* (*t*) the defendant became occupier of a house from which a lamp projected over the pavement. The attachment of the lamp to its bracket was in a decayed condition and owing to this it fell upon the plaintiff as she passed by on the pavement and injured her. The defendant was held liable; by Lush and

(*o*) *Ibid.*, 340; and *Lemmon v. Webb*, [1895] A. C. 1.

(*p*) [1926] 2 K. B. 332 (W. Cases, 200); applied in *Cunliffe v. Bankes*, [1945] 1 A. E. R. 459. See *Shirvell v. Hackwood Estates Co., Ltd.*, [1938] 2 K. B. 577, and *Cunliffe v. Bankes* (*ante*), for remarks on care in looking after trees.

(*q*) (1868), L. R. 3 H. L. 330; *post*, § 140.

(*r*) Blackburn, J., in *Tarry v. Ashton* (1876), 1 Q. B. D. 314, 319; Wright, J., in *Noble v. Harrison*, [1926] 2 K. B. 332, 343—344. Both opinions were *obiter*.

(*s*) Lush and Quam, J.J., in *Tarry's Case* (*supra*), at p. 320; Rowlatt, J., *obiter* in *Noble's Case* (*supra*), at p. 338.

(*t*) (1876), 1 Q. B. D. 314.

§§ 133, 134. Quain, JJ., on the ground that, although he had employed an apparently competent person to repair it, yet that was no answer to his duty to maintain it (in other words they applied *Rylands v. Fletcher*); by Blackburn, J., apparently on the ground of nuisance because the defendant knew of the defect and was liable for not having remedied it, even though he had employed an apparently competent person to repair it. The decision leaves no doubt that if the occupier knows of the defect he is liable (u); but what if he does not? Opinions on this differed in *Tarry v. Ashton*, but in *Wringe v. Cohen* (v), the Court of Appeal held that Blackburn, J., attached no importance to the defendant's knowledge or ignorance of the defect and that he would have been liable whether or not he knew or ought to have known of it. They regarded *Tarry v. Ashton* as a case of nuisance, but nevertheless made the duty of the occupier nearly as strict as that in *Rylands v. Fletcher*. Unfortunately none of their remarks on *Tarry v. Ashton* was necessary to their decision in *Wringe v. Cohen*, for as will be seen (*post*, p. 465) the latter case was concerned with a projection over private property, not over the highway (w). But in spite of their *dicta* being *obiter*, it is submitted that the Court of Appeal were right in making liability for artificial projections over the highway nearly as strict (a) as the rule in *Rylands v. Fletcher*; for that rule makes a person liable for damage done by the escape of fire, water, filth or any other thing which he brings on his land and which is likely to do mischief if it escapes, and it is difficult to see why such a projection is any less likely to do damage if it escapes than the substances named.

(2) The thing
affected.

§ 134. Essentials of nuisance.—(2) The thing with which interference takes place.

The interference must be with the enjoyment or use of land. Private nuisance, it has been said, "is correctly confined to injuries to property, whether to easements such as the obstruction of light or of rights of way, or the diversion of water courses, or the withdrawal of support from a house; or to other kinds of property, as by noise, noxious vapours,

(u) There was such knowledge in *Wilchick v. Marks*, [1931] 2 K. B. 56.
(v) [1940] 1 K. B. 229.

(w) See 56 L. Q. R. (1910) 1.

(a) Not quite so strict, for they did not extend it to harm caused by a secret operation of nature (*post*, p. 465).

smoke or the like. . . . In all such cases the plaintiff in order to maintain an action must show some title to the thing to which the nuisance is alleged to be " (b). § 134.

Who can sue.—Who, then, are the persons whom the law regards as having a " title to the thing " sufficient to found an action? They may be enumerated as follows :— Who can sue.

(i) The *occupier* of land; *i.e.*, the person in actual possession of it. The simplest case is that of the owner in possession. But a tenant for a term of years, unless he has assigned the term to another (c), also has the right, although where he is only a tenant from year to year and is under notice to quit, he cannot hope for an injunction unless the damage is very substantial; if it is less than that, he will be left to his action for damages; *e.g.*, trifling interference with lights (d). So, too, the mere probability that a circus will attract crowds of disorderly people will not entitle a yearly tenant to an injunction; but where considerable noise from the circus penetrates the house even through closed shutters and windows he can obtain one (e). And where there is real injury to health and comfort it is possible that even a weekly tenant can get an injunction as well as damages (f). (i) The occupier.

A lodger is presumably not entitled to sue for nuisance. This is no great hardship, for usually his occupancy is of a fleeting character and, even where it is not, he can get accommodation elsewhere with less difficulty than one who wants a tenancy. Much less has the guest of an occupier, or any other person who is merely present on the premises, any remedy for nuisance. This includes people like the occupier's wife, family and servants (g). There is a singular lack of direct authority on this point and the only judicial reason which has been given for it is that " it would manifestly be inconvenient and unreasonable if the right to complain of such interference extended beyond the occupier or (in case of injury to the reversion) the owner " of the property affected (h). It may perhaps be that the opposite rule would lead to

(b) *Cunard v. Antifyre, Ltd.*, [1933] 1 K. B. 551, 557.

(c) *Metropolitan Properties, Ltd. v. Jones*, [1939] 2 A. E. R. 202.

(d) *Jacob v. Knight* (1863), 3 De G. J. & S. 533.

(e) *Inchbald v. Robinson* (1869), L. R. 4 Ch. 388.

(f) *Per Jessel, M.R.*, in *Jones v. Chappell* (1869), L. R. 20 Eq. 539, 544.

(g) *Per Fletcher Moulton, L.J.*, in *Malone v. Laskey*, [1907] 2 K. B. 141, 153—154.

(h) *Cunard v. Antifyre, Ltd.*, [1933] 1 K. B. 551, 557.

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(ii) Reversioner.

multiplicity of actions or that it would tend to obliterate the line between nuisance and negligence.

(ii) The *reversioner* can sue if the nuisance must permanently injure his interest in the property. A permanent injury is one which will continue indefinitely unless something be done to remove it (*i*). Such is a building which infringes the right to ancient lights (*k*), or the keeping locked a gate across a path over which the reversioner has a right of way (*l*); but the emission of noise or fumes will not suffice (*m*).

(iii) User of highway.

(iii) The *user of the highway*.—This is apt to be overlooked in some statements of the law, but, as we have seen, such a person if he suffers special damage can sue (*n*).

(iv) Other cases?

(iv) It is doubtful whether there are any other persons who can be said to have sufficient "title" to sue. Sir Frederick Pollock was of opinion that in some instances there may be a private nuisance where the plaintiff has no control, use or enjoyment of immovable property; *e.g.*, the owner or master of a ship lying in a harbour might sue for a nuisance created by an occupier of the wharf or shore which made the ship uninhabitable (*o*). This seems reasonable although there is no decided case in favour of it, and indeed other text-books tend to imply the contrary (*p*); but perhaps it is consonant with general principle if we regard the sea as a highway for this purpose.

Who can be sued.

Who can be sued (q).—In general the person who creates the nuisance is always liable for it, whether or not he is in occupation of the land on which it originates; nor does it matter that the land is now occupied by some one else and the wrongdoer has no power to abate the nuisance without committing a trespass (*r*). That may seem unfair, but he did the first wrong and he must answer for the consequential damage (*s*).

Occupier liable.

Next, the occupier of the premises where the nuisance exists is in general liable. This is simple enough where he

(i) *Pearce & Meston, op. cit.*, 305.

(k) *Jesser v. Gifford* (1767), 4 Burr. 2141.

(l) *Kidgull v. Moor* (1850), 9 C. B. 364.

(m) *Simpson v. Savage* (1856), 1 C. B. (N.S.) 347.

(n) *Ante*, p. 451.

(o) *Torts*, 319.

(p) *Clerk & Lindsell, Torts*, 550, 588—591; *Pearce & Meston, op. cit.*, 12; *Garrett, op. cit.*, 233—236.

(q) *Cf. Dr. Friedmann in 59 L. Q. R.* 63—71.

(r) *Thompson v. Gibson* (1841), 7 M. & W. 456.

(s) *Holt, C.J., Rosewell v. Prior* (1701), 12 Mod. 635, 639.

himself created it, but further questions arise where it originated (i) with some one else lawfully on the premises; or (ii) with a trespasser; or (iii) with some one from whom the occupier acquired the property.

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As to (i), the ordinary rules of vicarious responsibility in tort apply if the nuisance were due to the occupier's servant or agent; but, in addition to that, he is liable for the acts of any one under his control. "Where a person is in possession of fixed property he must take care that the property is so used and managed that other persons are not injured, and that, whether his property be managed by his own immediate servants or by contractors or their servants" (t). Hence, a landowner is liable if he allows a gipsy encampment to be made upon his land which by reason of its noise and insanitary condition is a nuisance to adjoining inhabitants (u). So, too, where the nuisance is created by the guests or family of the occupier he is liable.

(i) Persons lawfully on premises.

These cases are easily intelligible, for the occupier's power of controlling such persons is obvious, and if he were not made responsible the injured party would often be left with no remedy worth pursuing. But the case of the independent contractor is not so easily explicable. His defaults do not usually make the person for whom he did the work liable in tort. But in the law of nuisance an exception occurs to this in a principle laid down by Cockburn, C.J., in *Bower v. Peate* (1876) (a): "A man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else—whether it be the contractor employed to do the work from which the danger arises or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful."

Independent contractor.

It must be confessed that the vagueness of the principle makes it hard to state a reason for it or to define its limits (b).

(t) *Littledale, J.*, in *Laugher v. Pomter* (1826), 5 B. & C. 547, 560.

(u) *Att.-Gen. v. Stone* (1895), 12 T. L. R. 76.

(a) 1 Q. B. D. 321, 326.

(b) Lord Cockburn questioned its breadth in *Hughes v. Percival* (1883), 8 App. Cas. 443, 446—447.

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It is said to be applicable where a "duty" is cast upon the defendant (c). But in what circumstances the duty arises can be deduced only from decided cases. Its germ is traceable in cases of interference with highways for the purpose of repairs or public utilities (d). Thus in *Hole v. Sittingbourne Ry.* (e) a railway company had parliamentary authority to build a bridge across a navigable river provided they did not impede navigation. The contractors whom they employed constructed it so imperfectly that it would not open to let boats pass. The company were held liable (f). Then the doctrine appeared in full bloom in infringement of the right of lateral support enjoyed by the occupier of one building against the occupier of an adjacent one; if A employs a contractor to make excavations or other alterations on his land and the contractor does them so carelessly that the building of B, the neighbour of A, collapses, then A is liable (g).

The principle is salutary enough in both these types of cases. Interfering with the highway when there is statutory or other authority for it is of course lawful; but carelessness in executing such work is so likely to cause widespread injury that the duty of those who are charged with it is rightly a stringent one. Interference with the right of support depends on a rather different consideration. It has been described as "an absolute right . . . infringed at the peril of the person infringing it" (h).

The next application of the principle was to operations on the highway which are dangerous in themselves, i.e., when the risk of harm to other people is obviously greater than in commonplace repairs to the road. Thus in *Holliday v. National Telephone Co.* (i), the defendants employed a plumber as independent contractor to assist in laying telephone wires in a street, and by his negligence in the management of a benzoline lamp he caused an explosion which bespattered the

(c) Lord Blackburn in *Dalton v. Angus* (1881), 6 App. Cas. 740, 829: a dictum repeatedly cited in later cases.

(d) In *Gray v. Pullen* (1864), 5 B. & S. 970, 978, Cockburn, C.J., had foreshadowed his full statement of the rule in *Bower v. Peate*

(e) (1861), 6 H. & N. 488.

(f) Following *Ellis v. Sheffield Gas Consumers Co.* (1853), 2 E. & B. 767. See, too, Lush and Quain, L.J.J., in *Tarry v. Ashton* (1876), 1 Q. B. D. 314, 320.

(g) *Bower v. Peate* (1876), 1 Q. B. D. 321; *Dalton v. Angus* (1881), 6 App. Cas. 740, 829.

(h) Wright, J., in *Blake v. Woolf*, [1898] 2 Q. B. 426, 429.

(i) [1899] 2 Q. B. 392.

plaintiff, a passer-by, with molten solder. The defendants were held liable. From this it was a short step to hold that the rule applies where dangerous work is undertaken *anywhere*; e.g., testing a gas-leak in a private house with a naked candle-light (*k*), or taking flash-light photographs of the interior of a theatre (*l*). And this step was a remarkable example of the development of the law of tort, for with it we have passed over the boundary of nuisance into the region of a new tort—one of the species of those of “strict liability” which we shall consider in Chapter XXIII.

But an employer is not liable in nuisance for the default of an independent contractor which is “collateral” negligence (*m*). What, then, is “collateral”? Different explanations have been suggested (*n*), but one might infer from the decided cases that negligence is collateral if it is not “in the course of employment” of the contractor in the same sense in which that phrase is used in connexion with the vicarious responsibility of a master for the torts of his servant. If the accident is due to misconduct of the contractor which is not incidental to what he has undertaken to do, then the person who hired him is no more liable than he would be if the contractor were his servant. At any rate, this, or something very much like it, was the view of the Court of Appeal in *Padbury v. Holliday* (*o*). The defendants had contracted with X to erect certain premises. They sub-contracted with Y for the insertion of metal window frames. One of Y’s workmen placed an iron tool on a window-sill. The casement was blown by the wind and this knocked the tool off the sill whence it fell into the street upon the plaintiff. The defendants were held not liable because the tool “was not placed on the window-sill in the normal course of doing the work which the sub-contractors were employed to do” (*p*).

(*k*) *Brooke v. Bool*, [1928] 2 K. B. 578.

(*l*) *Honeywill & Stein, Ltd. v. Larkin Bros., Ltd.*, [1934] 1 K. B. 191. See, too, *Matania v. Nat. Prov. Bank, Ltd.*, [1936] 2 A. E. R. 633; 155 L. T. 74; *Spicer v. Smee*, [1946] 1 A. E. R. 489, 495.

(*m*) Lord Blackburn in *Dalton v. Angus* (1881), 6 App. Cas. 740, 829; *Hardaker v. Idle D. C.*, [1896] 1 Q. B. 335, 341–342, 345, 352.

(*n*) Salmond, *Torts*, § 31 (5); S. Chapman in 50 L. Q. R. (1934) 78–81; Pearce & Neston, *op. cit.*, 321–322.

(*o*) (1912), 28 T. L. R. 494.

(*p*) Other decisions not inconsistent with this view are *Pickard v. Smith* (1861), 10 C. B. (N.S.) 470; *Hardaker v. Idle D. C.*, [1896] 1 Q. B. 335; *Penny v. Wimbledon U. D. C.*, [1899] 2 Q. B. 72; *Holliday v. N. T. C.*, *ibid.*, 392.

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A decision that has been regarded as out of joint with this is the earlier one in *Reedie v. L. & N. W. Ry.* (1849) (q). The company employed independent contractors to build a bridge and by the negligence of one of the contractors' servants a stone fell from the bridge and killed a passer-by on the highway. The company were held not liable. Yet the accident would seem to have been incidental to the normal course of the work. But the report of the case shows that the whole doctrine under discussion was in its infancy and had yet to be worked out judicially (r).

(ii) Trespasser.

(ii) If the nuisance is created by a trespasser, the occupier is not liable unless, with knowledge or means of knowledge on the part of himself or his agent, (i) he continues the nuisance without taking reasonably prompt and efficient steps for its abatement; or (ii) he adopts the nuisance by making any use of the thing which constitutes it. It was in these terms that the House of Lords in *Sedleigh-Denfield v. O'Callaghan* (s) expressed in greater detail what had been laid down by the Court of Appeal nearly thirty years earlier in *Barker v. Herbert* (t). In the *Sedleigh-Denfield Case*, X occupied land on which was a ditch. A trespasser laid a pipe in it with a grating designed to keep out leaves, but placed in such an ill-chosen position that it actually caused the blocking of the pipe when a heavy rainstorm fell. Y's adjacent land was consequently flooded. The storm occurred nearly three years after the erection of the grating and during that period X's servant, who was responsible for cleansing the ditch, ought to have realised the risk of flooding from the obstruction. X was held liable to Y for nuisance. Their lordships also declined to accept the distinction drawn in this connexion by Bankes, L.J., in *Job Edwards v. Birmingham Navigations* (u) between public and private nuisance.

(iii) Predecessor in title.

(iii) Where the nuisance existed before the occupier acquired the property, he will be liable if it be proved that he knew, or ought reasonably to have known, of its existence;

(q) 4 Ex. 244.

(r) Cf. 80 R. R., Pref. vi—vii, where Sir Frederick Pollock was of opinion that the decision could be supported on other grounds.

(s) [1940] A. C. 880 (W. Cases, 205, where the name of the case is that in 109 L. J. K. B. 893); applied in *Leanse v. Egerton*, [1943] K. B. 323.

(t) [1911] 2 K. B. 633.

(u) [1924] 1 K. B. 341. The actual decision in that case may be valid on other grounds, though *dicta* in *Sedleigh-Denfield's Case* leave even that uncertain: [1940] A. C. 893, 918—919.

but not otherwise. In *St. Anne's Well Brewery Co. v. Roberts* (a), X owned an ancient inn one side of which was bounded by the old city wall of Exeter. Y owned part of the wall. On either side of X's kitchen fireplace, recesses had at some time unknown been formed by excavations in the wall. Part of the wall belonging to Y collapsed and demolished the inn. X sued Y who was held not liable because he neither knew of the defect nor could have discovered it by reasonable diligence (b).

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Most of the case law on the liability of the predecessor in title for a nuisance on premises which are now in the occupation of a successor is connected with landlord and tenant, and the subject is much too important and complicated to be dismissed as a mere special instance of the rule just enunciated. We are speaking here of the liability of landlord or tenant to a third person; liability of the landlord to the tenant usually depends on contract (c) or, where responsibility in tort is concerned, relates to that heading of tort which is styled "Dangerous Structures" (*post*, Chapter XXII). With regard to third parties there has been some historical development owing to the modern tendency of both the Legislature and the Courts to attach greater responsibility to owners of premises abutting on the highway. The authorities are in a rather tangled condition, but the law may perhaps be stated as follows. In general, the landlord is not liable for a nuisance on the premises, as he is not in occupation; the proper person to sue is the tenant (d). But the landlord is liable in the following circumstances.

Liability of landlord.

(1) If he has expressly or impliedly authorised his tenant to create the nuisance; *e.g.*, where A let a field to B for working it as a lime quarry and B's acts in blasting the limestone and letting smoke escape from the kilns constituted a nuisance to C, A was held liable, for B's method of working the quarry was the usual way of getting lime and A was

(1) If he has authorised nuisance.

(a) (1929), 140 L. T. 1. Followed in *Wilkins v. Leighton*, [1932] 2 Ch. 106.

(b) In *Broder v. Saillard* (1876), 2 Ch. D. 692, one must assume that there had not been such reasonable diligence on the defendant's part with respect to leakage from a soil-pipe, or else that *Rylands v. Fletcher* applied. See [1940] A. C. at p. 898.

(c) See, *e.g.*, *Malzy v. Eichholz*, [1916] 2 K. B. 308.

(d) *Cheetham v. Hampson* (1791), 4 T. R. 318.

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taken to have authorised it (e). Here the liability of the landlord is no otherwise than that of any principal who authorises his agent to commit a tort. The tenant of course is also liable.

(2) If he knew of nuisance before letting.

(2) If the nuisance were on the premises before he parted with them and he knew of it. Here, too, he only exemplifies the general principle that he who has created a nuisance is always liable for it (f). Moreover, the tenant will be liable for continuing it, but perhaps he will be exempt if the nuisance or its source was something whereof he neither knew nor could reasonably have known, such as the sudden collapse of an apparently sound building (g); though this will not help him if, when he gets to know of the nuisance or the risk of its occurrence, he takes no steps to extinguish it.

(3) If he ought to have known of nuisance before letting.

(3) If the nuisance were unknown at the date of the lease, the landlord is liable, but not if he had no reasonable grounds for suspecting its existence. This result has been attained gradually and by steps of doubtful consistency. In *Gandy v. Jubber* (h), the plaintiff was lamed by slipping through a defective iron grating over the area of a house in the occupation of X. She sued the defendant, who had originally let the premises to X. The Court (i) were of opinion that there was no tenancy between the defendant and X and they held that, even if there were one, the defendant was not liable because it was not alleged that the grating was defective at the time of the letting. But they also thought that, if there had been a tenancy, the defendant would have been liable for the nuisance provided (i) it had existed at the date of the creation of the tenancy, and (ii) defendant had had notice of it, and (iii) it was such as to be in its very essence and nature a nuisance at the date of letting and was not merely some defect capable of being rendered a nuisance by the tenant after the tenancy had begun; e.g., a cellar with a flap is not an obvious nuisance; it may or may not be one according to the flap being improperly left open or carefully

(e) *Harris v. James* (1876), 45 L. J. Q. B. 545; *Rich v. Basterfield* (1847), 4 C. B. 783, was regarded by Blackburn, J., as a decision on the facts, and by Lush, J., as hair-splitting.

(f) *Rosewell v. Prior* (1701), 12 Mod. 635; *Todd v. Flight* (1860), 9 C. B. (N.S.) 377.

(g) *Semble* from *St. Anne's Well Brewery Co. v. Roberts* (1929), 140 L. T. 1.

(h) (1865), 5 B. & S. 78, 485; 9 B. & S. 15.

(i) 9 B. & S. 15; an undelivered judgment of the Exch. Chamber.

closed (k). The Court considered that if the above three conditions were fulfilled, the lessor ought to be liable because it is only just that the owner of property receiving rent should be thus answerable. A sweeping *dictum* in the later case of *Nelson v. Liverpool Brewery Co.* (l) might imply that unless the landlord actually knew of the nuisance he could not be liable for it; but still later *dicta* have narrowed it and probably the rule now is that the landlord is liable not only if he knew of the defect but also if he could have ascertained it with reasonable care, whether it were obvious or not (m).

Nor does the liability of the landlord, where it is established, exclude that of the tenant. In *Wilchick v. Marks* (n) the plaintiff was walking along the highway when she was injured by the fall of a defective shutter from X's house. X had let the house to Y and both X and Y knew of the defect. There was no covenant on either side to repair. Both were held liable; Y because he was the occupant and also because, if the rule were otherwise and the landlord happened to be abroad, the damage might be done before he could be notified of the risk and called upon to repair it; X because he had reserved to himself the right to enter and do repairs (though he was under no obligation to do them) and was therefore liable on the ground of "proximity" (o).

The tenant is also presumably liable even if he does not know of the defect provided he could have ascertained it if he had used reasonable care.

(4) Hitherto we have assumed that neither landlord nor tenant is under a covenant to repair. Suppose that there is such a covenant, that it is not observed and that a nuisance consequently arises which causes an injury to a third person, how does that affect the position?

If it is the tenant who has undertaken the repair, of course

(4) Where
covenant to
repair?

(k) *Ibid.*, and *Blackburn. J.*, in 5 B. & S. at p. 90. Cf. *Lindley, L.J.*, in *Gwinnell v. Eanier* (1875), L. R. 10 C. P. 658, 662.

(l) (1877), 2 C. P. D. 311. In any event the decision related to visitors coming on the premises and therefore belonged to a different branch of the law ("Dangerous Structures"; post, Chap. XXII).

(m) *St. Anne's Well Brewery Co. v. Roberts* (1929), 140 L. T. 1; *Goddard, J.*, in *Wilchick v. Marks*, [1934] 2 K. B. 56, 67-68.

(n) [1934] 2 K. B. 56.

(o) This was not explained but it seems to mean the "proximity" which makes a person one's neighbour in the law of negligence and so puts upon one a legal duty to take care towards him: *ante*, § 123.

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he is liable; but his liability is based on the fact that he is the occupier of the premises; any additional obligation which he may have undertaken by contract with the landlord cannot affect his liability in tort to third parties. But does such an undertaking exempt the landlord from liability for the nuisance? It certainly does so if he did not know of the defect, but if he were aware of it the answer is doubtful. It was held in *Pretty v. Bickmore* (p) that even then he is exempt because he has done nothing to authorise the continuance of the nuisance, but this has been unsettled by later *obiter dicta* (q). It is suggested that a distinction might be drawn between a nuisance which is in existence at the date of the lease and one which arises later; and that in the former case if the landlord knew or had reasonable grounds for knowing its existence, then he ought to be liable as well as the tenant, whether or not there be any covenant to repair: for in such circumstances it is idle to say that he has done nothing to authorise the continuance of the nuisance. However, *Pretty v. Bickmore* is the other way. Where the nuisance arises only after the tenancy has begun, it would be unjust to hold the landlord liable and the law is that he is not liable.

If it is the landlord who has undertaken to repair, he is liable. Such was the decision in *Payne v. Rogers* (r), where Heath, J., said that if the tenant, and not the landlord, were held liable this would encourage circuity of action because the tenant would then be able to recoup himself against the landlord. A better ground than this very unsatisfactory one is that in such circumstances the landlord has control of the premises. He may not be in occupation but his covenant to repair gives him a right of access to the premises for the very purpose of preventing the injury which has occurred (s). However, be the reason what it may, he is liable; and this is so even if, without any covenant to do external repairs, he has reserved the right to enter and do all necessary repairs

(p) (1873), L. R. 8 C. P. 401. The fact of the landlord's knowledge appears more clearly in the reports in 28 L. T. 704 (Honyman, J.) and 21 W. R. 733.

(q) Brett, J., in *Gwinnell v. Eamer* (1875), L. R. 10 C. P. 658, 661; Goddard, J., in *Wilchick v. Marks*, [1934] 2 K. B. 56, 67. The C. A. in *Wringe v. Cohen*, [1940] 1 K. B. 229, 235—236, 246.

(r) (1794), 2 H. Bl. 350. So, too, *dictum* in *Nelson v. Liverpool Brewery Co.* (1877), 2 C. P. D. 311, 313.

(s) Cf. Collins, M.R., in *Cavalier v. Pope*, [1905] 2 K. B. 757, 762.

at the tenant's expense (t). Moreover, in *Wringe v. Cohen* the Court of Appeal held that the landlord is liable, irrespective of his knowledge of the defect (u). It is submitted that this places too heavy a burden on landlords. The Court of Appeal regarded their liability as just the same as that of occupiers of buildings for injuries done by the collapse of artificial projections on to the adjacent highway (*ante*, p. 452). But there the safety of the general public is at stake and it is right that the duty should be stricter, whereas in *Wringe v. Cohen* the case had nothing to do with a highway (a). A had let a house to B and the duty to keep it in repair was on A. A decayed gable end fell from the house on to C's shop and destroyed its roof. Held, A was liable to C for nuisance, whether A did or did not know of the defect. It was conceded, however, that if the defect were due to either (i) a secret and unobservable operation of nature (*e.g.*, subsidence under or near the foundations of the premises), or (ii) the act of a trespasser, then neither landlord nor tenant would be liable, unless, with knowledge or means of knowledge, he were to allow the danger to continue (b). Where the landlord is under a duty to repair and injury to a third party has resulted from a breach of the duty, it is uncertain whether the tenant is also liable. Heath, J., in *Payne v. Rogers* (*ante*, p. 464), seemed to imply that he is not, but 140 years later Lawrence, L.J., expressed an opinion that he is. "Any bargain made by the person responsible to his neighbour or to the public that another person should perform that obligation may give rise to rights as between the two contracting parties, but does not, in my judgment, in any way affect any right of third parties, who are not parties or privy to such contract" (c). This reasoning certainly represents current

(t) *Heap v. Ind, Coope & Allsopp, Ltd.*, [1940] 2 K. B. 476.

(u) [1940] 1 K. B. 229.

(a) See 56 L. Q. R. (1940), 1. The criticism of Professor Goodhart (7 Modern Law Review, 88) of the view which I have expressed in the text *supra*, seems to attribute too wide a scope to the opinion of the House of Lords in the *Sedleigh-Denfield Case* as to the absence of any distinction between public nuisance and private nuisance (*ante*, p. 460). See Salmond, Torts, 241, note (r), for Dr. Stallybrass's view.

(b) [1940] 1 K. B. at p. 233.

(c) *St. Anne's Well Brewery Co. v. Roberts* (1929), 140 L. T. 1, 8. The case was not one of landlord and tenant, but the C. A. in *Wringe v. Cohen*, [1940] 1 K. B. 229, 245—246, apparently regarded the absence of knowledge on the part of the occupier as irrelevant in the *St. Anne's Case*. But this was one more of the *obiter dicta* with which *Wringe's Case* is replete, and it is contrary to the decision in the *St. Anne's Case*.

§§ 134, 135. judicial tendencies which are against the mischievous fallacy that if X is injured by A and the injury happens to be a breach of a contract between A and B, X cannot sue A in tort. If it be thought that it is hard upon the tenant to urge that he should be liable, it may be retorted that he can recoup himself against the landlord on the covenant (d).

As has been indicated, harm occurring to persons who come upon the premises will be treated in Chapter XXII on "Dangerous Structures".

(3) Damage

§ 135. Essentials of nuisance.—(3) Damage.

It cannot be said in a breath either that damage is always an essential or that it never is.

If the nuisance be a public one, it has long been settled that the plaintiff must prove damage (e). But where it is not public, although it is said that damage must be proved, the law will often presume it. Thus in *Fay v. Prentice* (f) a cornice of the defendant's house projected over the plaintiff's garden so that rain water dripped from it on the garden, and it was held that the law would infer injury to the plaintiff without proof of it. This inference appears to apply to any nuisance where the damage is so likely to occur that it would be superfluous to demand evidence that it has occurred (g). Hence it stops short where the discomfort is purely personal, for personal sensitiveness to smells, smoke and the like varies considerably and it is only fair that evidence of substantial annoyance should be required (h).

Again, no present damage need be proved where the nuisance is to an easement or *profit à prendre*, at any rate where the claim is for damages as distinct from a mandatory injunction (i), because, it is said, if it were not presumed, it

(d) See Dr. Stallybrass in 45 L. Q. R. (1929), 118—121.

(e) Comyns, Digest (5th ed. 1822), Action upon the Case for Nuisance (C), and authorities there cited.

(f) (1845), 1 C. B. 828.

(g) As was said in a case like *Fay v. Prentice* some centuries earlier, "*nunc pluit et toto nunc Jupiter aethere fulget*, and that every one knows": *Baten's Case* (1610). 9 Rep. 53 b, 54 b.

(h) Cf. Clerk & Lindsell, Torts, 167.

(i) There substantial damage must be proved, at any rate in infringement of light: *Colls v. Home and Colonial Stores*, [1901] A. C. 179. The decision might, however, be interpreted rather as defining the limits of the right of light than as laying down any rule with respect to the necessity of proving damage. It is arguable that what the H. J. actually decided was that the right exists only with respect to a particular amount of light.

might be difficult to establish that any one act had caused it and yet a series of such acts or the continuance of one particular act would be evidence in the future that the plaintiff had acquiesced in the annoyance and, if twenty years elapsed, he would be barred by prescription from suing at all (*k*). It is true that this reasoning may appear to beg the question, because such series or continuance is no evidence against the plaintiff until he has the means of resistance and often the only way of resisting is by bringing an action; but it is well known to practitioners that he would frequently find it a hard task, if the interference had gone on for a long time, to prove that he could not have sued earlier on the ground that he had suffered no damage (*l*). In these cases, however, although no present damage need be proved, probability that substantial damage will ensue must be shown; otherwise the law would be redressing merely fanciful claims (*m*). A recent illustration of the rule that no damage need be proved where the nuisance is to a *profit à prendre* is *Nicholls v. Ely Beet Sugar Factory, Ltd.* (*n*). Large quantities of refuse and effluent were alleged to have been discharged from the defendants' beet sugar factory into a river in which the plaintiff owned two several and exclusive fisheries. The Court of Appeal held that there was no need for him to prove pecuniary loss, the injury being one actionable *per se*, although he lost his action on the ground that he had failed to show that the defendant had caused the injury (*o*).

§§ 135, 136.

§ 136. Defences considered.

We must now discuss peculiar defences which at one time or another have been pleaded to nuisance. Some of them are bad, some dubious and some need qualification in statement to make them valid.

Defences,
sound and
unsound.

(*k*) Cf. Kelly, C.B., in *Harrop v. Hirst* (1868), L. R. 4 Ex. 43, 45, 46—47; Lord Wright, M.R., in *Nicholls v. Ely Beet Sugar Factory, Ltd.*, [1936] Ch. 343, 349—350.

(*l*) Clerk & Lindell, *Torts* (8th ed.), 115 (omitted in 9th ed.).

(*m*) *Kensit v. G. E. Ry.* (1884), 27 Ch. D. 122.

(*n*) [1936] Ch. 343. Cf. 52 L. Q. R. (1936), 463—465.

(*o*) Lord Wright, M.R., at p. 349, adopted Sir Frederick Pollock's view (*Torts*, 299): "Disturbance of easements and the like, as completely existing rights of use and enjoyment, is a wrong in the nature of trespass, and remediable by action without any allegation or proof of specific damage; the action was on the case under the old forms of pleading, since trespass was technically impossible, though the act of disturbance might include a distinct trespass of some kind, for which trespass would lie at the plaintiff's option."

§ 136.

Coming to
nuisance no
defence.

(1) It is usually said that it is no defence to prove that the plaintiff came to the nuisance or that the place is a convenient one for committing it. What this means is that if the annoyance is unreasonable in that particular district, then the plaintiff can recover even if it has been going on long before he came there. In *Bliss v. Hall* (p), the defendant had set up a tallow-chandlery which emitted "divers noisome, noxious, and offensive vapours, fumes, smells and stench" to the discomfort of the plaintiff, who had taken a house near it. It was held to be no defence that the business had been in existence for three years before the plaintiff's arrival, for he "came to the house . . . with all the rights which the common law affords, and one of them is a right to wholesome air" (q).

But if a man chooses to make his home in the heart of a coal-field or in a manufacturing district, he can expect no more freedom from the discomfort usually associated with such a place than any other resident can. The oft-cited dictum that "What would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey" (r) puts the matter concisely and needs only the addition that Belgrave Square may in course of time fall to the level of Bermondsey, for that has happened with many another aristocratic quarter of London (s).

Usefulness
not in itself
a defence.

(2) The mere fact that a process or business is useful to persons generally, in spite of its annoyance to the plaintiff, is no defence. One who keeps a pigsty, a tannery, a lime-kiln or an iron foundry is pursuing a laudable occupation and possibly one of great benefit to the public; yet that, by itself, will not excuse him. So, in *Adams v. Ursell* (t) a fried-fish shop was held to be a nuisance in the residential part of a street where it was carried on, although it was urged that an injunction would cause great hardship to the defendant and to the poor people who were his customers; the answer was that he could carry it on elsewhere, as, although it might be a nuisance in one district it might not in another, and

(p) (1838), 4 Bing. N. C. 183.

(q) *Tindal, C.J., ibid.*, 186. So, too, *Elliotson v. Feetham* (1835), 2 Bing. N. C. 134.

(r) *Sturges v. Bridgman* (1879), 11 Ch. D. 852, 865.

(s) As to the effect of a contract not to sue for annoyance, see *Andreae v. Selfridge & Co., Ltd.*, [1936] 2 A. E. R. 1413 (this point was not raised on appeal: [1938] Ch. 1).

(t) [1913] 1 Ch. 269.

indeed the injunction granted did not extend to the whole street. § 136.

(3) It is no defence that the nuisance is created by independent acts of different persons, although the act of any one of them would not be unlawful; *e.g.*, where a hundred people independently leave one hundred wheelbarrows in a place and the obstruction consists in the aggregation of these vehicles and not in the presence of any one of them (*u*). To hold otherwise would be to compel the plaintiff to prove the precise degree of annoyance caused by each wrongdoer—a task which would often be impossible.

No defence that it is due to many.

(4) Twenty years' continuance will, by prescription, legalise a private nuisance (but not a public one) (*a*). But the period will not commence to run until the nuisance is known by the plaintiff to exist. The secret discharge of pollution upon his premises cannot be a root of prejudice to his rights until he knows of, or suspects, it (*b*). This qualification is of especial importance where the nuisance has been in existence before the plaintiff came to it. In *Sturges v. Bridgman* (*c*) a confectioner had for more than twenty years used large pestles and mortars in the back of his premises which abutted on the garden of a physician, and the noise and vibration were not felt to be a nuisance during that period. Then, however, the physician built a consulting-room at the end of his garden and found that the noise and vibration materially interfered with the pursuit of his practice. He was granted an injunction against the confectioner.

Twenty years' prescription a defence.

(5) In the chapter on Conversion (§ 108), the rule was noted that where the plaintiff is in possession of goods it is useless for the defendant who interfered with them to plead *jus tertii*, *i.e.*, that some third party has a better title to the goods than the plaintiff. This rule has been extended to an action for a nuisance created by polluting a privately

Jus tertii.

(*u*) *Thorpe v. Brumfit* (1873), L. R. 8 Ch. 650, 656; *Lambton v. Mellish*, [1894] 3 Ch. 163.

(*a*) For difficulties with respect to this rule, see Clerk & Lindsell, Torts, 583–584.

(*b*) *Liverpool Corporation v. Coghull & Son, Ltd.*, [1918] 1 Ch. 307.

(*c*) (1879), 11 Ch. D. 852 (W. Cases, 203). No reference was made to the dictum of Lopes, J., in *Robinson v. Kilvert* (*ante*, p. 444), presumably because the work of any medical specialist must be regarded as one branch of the medical profession and therefore not an "exceptionally delicate" occupation.

§§ 136, 137. owned fishery; in *Nicholls v. Ely Beet Sugar Factory* (d). Farwell, J., held that the defendant to such an action cannot plead *jus tertii*, but the learned Judge left it open whether this applied to nuisances in general.

It is not obvious why the principle should have been stretched to nuisance of any kind, whether to a fishery or otherwise; for to commit a nuisance to another person's property does not necessarily constitute a reflection on his title to it (the essence of conversion), and, even if it did, it is quite sufficient for the person who wishes to sue for nuisance to have possession of the property to enable him to bring the action; in fact, he cannot sue unless he has possession. If that be the law, what has *jus tertii* got to do with the question? (e).

Nuisance and trespass.

§ 137. Nuisance and trespass to land (f).

The leading text-books are in direct conflict on the relation of nuisance to trespass. According to one view these two torts may possibly coincide, some kinds of nuisance being also trespass to land (g); according to another view they are mutually exclusive (h).

History.

Some help in solving the difficulty is obtainable from the history of the law. After the action upon the case for nuisance (which, in effect, is the present Common Law remedy) had emerged, the idea seems to have prevailed for a time that if the harm was caused by the defendant but did not originate on his land, the proper remedy against him was not nuisance but trespass *vi et armis* (i). Thus in 1656 (k), A injured B's

(d) [1931] 2 Ch. 84.

(e) In *Newcastle-under-Lyme Corporation v. Wolstanton, Ltd.*, [1917] Ch. 92, 109—110. Evershed, J., expressed agreement with the above paragraph, and the Court of Appeal's reversal of part of his decision was on grounds not affecting this *dictum*, [1917] 1 Ch. 427, 467—468. In *Nicholls' Case* (*supra*), Farwell, J., agreed with, and considered himself bound by *Fitzgerald v. Firbank*, [1897] 2 Ch. 96, a decision of Kekewich, J., affirmed by the C. A. Farwell, J., however, admitted that the point about *jus tertii* was not raised in the C. A., but he assumed that it must have been present to that Court. It is respectfully urged that Kekewich, J.'s judgment (at p. 97) proceeded on the correct ground that *jus tertii* is irrelevant in an action for nuisance because the very nature of the tort makes it so; that in the C. A. counsel had not the temerity to raise the point again; and that this was why no reference was made to it in the judgment of the C. A. Cf. Scott, L.J., in *Paine & Co., Ltd. v. St. Neots Gas Co.*, [1939] 3 A. E. R. 812, 816—817.

(f) Discussed in 4 Cambridge Law Journal, 201—203.

(g) Pollock, Torts, 319

(h) Salmond, Torts, § 53 (5)

(i) Y. B. Trin. 13 Hen. 7, f. 26, pl. 4.

(k) *Preston v. Mercer*, Hardres 60.

building by allowing filth and stinking water to escape from A's land. B sued A for trespass *vi et armis*. It was urged that case was the correct remedy because trespass could not be committed on the defendant's own land, but "after great wavering" there was judgment for the plaintiff. Now the hesitation of the Court is easy to understand, for the question, "Where did the harm begin?" may be a pretty problem in causation. If you complain of the smell from my pigsty, does the harm begin at my sty or when the smell assaults your nostrils? And although we hear no more of the problem in the reports in the shape of a dispute whether the trouble began on the land of the plaintiff or on that of the defendant, that is only because it was merged in the wider question, "Was the damage direct or consequential?" And in later cases this was made the vital distinction between trespass and case. Thus in *Reynolds v. Clerk* (1725) (1), Fortescue, J., said: "Trespass upon the case, and trespass *vi et armis*, are different in name and in their nature; for the one [sc. trespass upon the case] is called an action for a nuisance and the other are [sic] called *actiones injuriarum*; the one [sc. trespass *vi et armis*] must be brought for a wrong done immediately to the person or his possession, the other for a consequential damage. . . . If logs are laid in the highway by which any person is hurt, he must bring case; but if the hurt is received by logs thrown at the person, he must bring trespass *vi et armis*."

Like many another judicial attempt to grapple with causation, this gave rise to endless arguments in borderline cases, and the unfortunate litigants were certainly not the only people who stumbled among the logs. Then, too, matters were complicated by a subsidiary rule. Every plaintiff in trespass could tack to the claim for immediate injury a "*per quod*" or allegation of consequential damage. If he did this, his action for trespass always included an action on the case (*m*). This thickened the metaphysical mess, but helped the administration of justice, for to some extent it relieved the plaintiff of the perils attaching to a wrong choice of remedy.

(1) 8 Mod. 272.

(m) "The same evidence that will maintain trespass, may also frequently maintain case, but not *e converso*." Blackstone, J., in *Scott v. Shepherd* (1772), 2 W. Bl. 892, 897.

§§ 137, 138.

Now probably
distinct torts.

Upon the whole, it would appear that nuisance and trespass are, even at the present day, distinct torts, and that the line of division between them is the old one between trespass and case (*n*). Authority indicates, though not conclusively, that trespass, not nuisance, is the right action for a continuing trespass (*o*). But the distinction, albeit verbally correct, is a hollow one, for it must be traced along the old lines of separation between trespass and case, and the *per quod* allegation went so near to obliterating these lines as to make demarcation a hard task. Moreover, at the present day it is not very vital to success in an action, for if the plaintiff is in doubt whether the injury to him is trespass or nuisance, he can easily combine alternative claims for them in the same litigation. He must, of course, see that he has evidence to establish at least one of the two torts, for two practical differences occur here :

(a) Trespass is a wrong to possession, while nuisance is not limited to this.

(b) In trespass damage need not be proved, in nuisance of certain kinds it must be (*ante*, § 135).

Nuisance and
negligence.

§ 138. Nuisance and negligence (*p*).

It is possible for the same set of facts to support an action for either negligence or nuisance (*q*), but it is certainly not true that these two torts are always coincident.

Formerly
confused but
now distinct.

In the historical development of negligence as a tort it was in its earlier stages much entangled with nuisance (*r*). Until quite recently there was a hybrid action of nuisance and negligence. Sometimes it looked as if negligence were the substance of the action and nuisance were an untechnical term (*s*); sometimes the exact reverse would be the truth (*t*),

(*n*) *Scrutton, L.J.*, in *St. Anne's Well Brewery Co. v. Roberts* (1929), 140 L. T. 1. 6.

(*o*) *Holmes v. Wilson* (1839), 10 A. & E. 503; the earlier *nisi prius* opinion of Lord Ellenborough, C.J., in *Lawrence v. Obee* (1815), 1 Stark. 22, was cited in argument but ignored in the judgment. *Hudson v. Nicholson* (1839), 5 M. & W. 436.

(*p*) 4 Cambridge Law Journal, 197—201.

(*q*) In *O'Gorman v. O'Gorman*, [1903] 2 Ir. R. 573, bees kept in unreasonable numbers and in an unreasonable place escaped from defendant's land and injured plaintiff. Defendant was held liable by one Judge on the ground of nuisance, by another on the ground of negligence; and apparently the rule in *Rylands v. Fletcher* (1868), L. R. 3 H. L. 330 (*post*, Chap. XIX), might have applied.

(*r*) 42 L. Q. R. (1926), 197—198.

(*s*) *Coupland v. Hardingham* (1813), 3 Camp. 398.

(*t*) *Wilkins v. Day* (1883), 12 Q. B. D. 110.

and then, again, "negligent" has figured as a persistent term in the plaintiff's declaration only to be persistently ignored by the Court in deciding on grounds of nuisance (u). Finally there are judgments which baffle us; they must have gone upon one ground or the other, but on which must remain a secret (a). However, nowadays there is a strong judicial tendency to exorcise the ghost of action upon the case for negligence from the action for nuisance (b). They are, moreover, distinguishable in the following respects.

(1) In negligence the plaintiff must prove that the defendant was under a legal duty to take care. In nuisance this is unnecessary; all that the plaintiff need show, in order to make out a claim *prima facie* is that he has been injured by the defendant's conduct. He starts with the presumptive rule in his favour that every man is bound so to use his own property that he does not injure his neighbour. The burden is on the defendant to establish some appropriate defence.

(2) In negligence, assuming that the duty to take care has been proved, the vital question is, "Did the defendant take reasonable care?" But in nuisance, as has been shown (*ante*, p. 442), it does not follow that the defendant is not liable because he has taken reasonable care.

(3) Contributory negligence as a defence to nuisance signifies not so much careless conduct on the part of the plaintiff (although it may include that) as the plea that the plaintiff's injury was due to his own conduct (c). Thus it is a rule in nuisance that it is no defence to plead that the plaintiff came to the nuisance, but it is also a rule that account must be taken of the district where the alleged nuisance takes place and that if he goes to reside in a great industrial area he must put up with a good deal more inconvenience than if he lives in the country. But if he sued for nuisance simply because he

(u) *Gandy v. Jubber* (1864), 5 B. & S. 78; *Borough of Bathurst v. Macpherson* (1879), 4 App. Cas. 256.

(a) *E.g.*, Blackburn, J., in *Tarry v. Ashton* (1876), 1 Q. B. D. 314. In *Wringe v. Cohen*, [1940] 1 K. B. 229 (*ante*, p. 465), the C. A. regarded *Tarry v. Ashton* as a case of nuisance.

(b) "'Nuisance' and 'negligence' are different in their nature and consequences": Fletcher Moulton, L.J., in *Wing v. L. G. O. Co.*, [1909] 2 K. B. 652, 665. "The differences between cases of nuisance and cases of negligence must never be lost sight of": Hamilton, L.J., in *Latham v. Johnson*, [1913] 1 K. B. 398, 413. See, too, Pickford, L.J., in *Wheeler v. Morris* (1915), 84 L. J. K. B. 1435, 1438; *Cumard v. Antifyre, Ltd.*, [1933] 1 K. B. 551, 556-557.

(c) Cf. Lord Atkin in [1940] A. C. at p. 165.

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cannot bear the noise and vibration which other inhabitants take for granted, he would lose his action, not because there is any contributory negligence on his part but only because reasonableness generally (and not reasonable care in particular) is a consideration in determining whether a nuisance exists; and he has behaved unreasonably in the circumstances (*d*). So, too, with the plaintiff's acquiescence in the alleged nuisance. "If one man stands by and encourages, though but passively, another to lay out money under an erroneous opinion of title, or under the obvious expectation that no obstacle will afterwards be interposed in the way of his enjoyment, the Court will not permit any subsequent interference with it by him who formally permitted and encouraged those acts, of which he either now complains or seeks to obtain the advantage" (*e*).

(4) Distinct cases.

(4) Many instances of nuisance and negligence, respectively, have nothing in common. Careless surgery may be negligence; it is not nuisance. Obstructing ancient lights may be a nuisance; it is not negligence.

The relation of nuisance to the rule in *Rylands v. Fletcher* (*f*) must be postponed to the chapter dealing with that rule (*post*, § 143).

(*d*) This is the explanation of *Fenna v. Clare* (1891), 64 L. T. Q. B. 238, where the question of contributory negligence was left to the jury in an action for nuisance.

(*e*) Romilly, M.R., in *Rochdale Canal Co. v. King* (1853), 22 L. J. Ch. 604, 606. See, too, *Att.-Gen. v. Grand Junction Canal Co.*, [1909] 2 Ch. 505; *Johnson v. Wyatt* (1866), 33 L. J. Ch. 391; and, as to what is acquiescence, *Garrett, op. cit.*, 399—401. Mere delay in suing, as distinct from acquiescence, is material only with respect to the Statute of Limitation: *Jones v. Llanrwst U. D. C.*, [1911] 1 Ch. 393, 411. For laches, see *A. L. Smith, L.J.*, in *Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287, 322.

(*f*) (1868), L. R. 3 H. L. 330.

CHAPTER XIX

STRICT LIABILITY. THE RULE IN RYLANDS v. FLETCHER

§ 139. Hitherto we have dealt with torts in most of §§ 139, 140. which intention or inadvertence is an essential. Some exceptions were noticed, such as vicarious responsibility and, to a certain extent, trespass and conversion. We have now to discuss a series of wrongs in which, in a greater or less degree, there is stricter liability than in others. It is no defence that the harm was not intentional. In some of them it is no defence that the harm was not even negligent; in others, absence of negligence may be a defence but a much higher standard of care is required than in the ordinary tort of negligence. The differences between these torts and trespass and conversion are, first, that they were born later than these torts, none of them (with the exception of liability for cattle-trespass and for harm done by savage animals) being older than the latter half of last century; and, secondly, that they are concerned with acts or facts that have a much greater element of danger in them than walking on another man's land or mistakenly taking his goods. Not one of them has a neat title, but they may be classified thus:—

Varieties
of strict
liability.

- (1) The rule in *Rylands v. Fletcher*.
- (2) Liability for animals.
- (3) Liability for dangerous chattels.
- (4) Liability for dangerous structures.
- (5) Liability for dangerous operations (a).

We shall take these in successive chapters, beginning with (1) in this.

§ 140. The Rule in *Rylands v. Fletcher* (b).

*Rylands v.
Fletcher.*

The facts of this case were as follows. B employed independent contractors, who were apparently competent, to

(a) No. (5) was doubted by Scott, L.J., in *Read v. Lyons & Co., Ltd.*, [1945] K. B. 216, 239; see *post*, § 168, for an answer to his doubt.

(b) (1865), 3 H. & C. 774 (Court of Exchequer); (1866) L. R. 1 Ex. 265 (Court of Exchequer Chamber); (1868), L. R. 3 H. L. 330 (House of Lords) (W. Cases, 212). Periodical literature on the decision is voluminous. For an excellent American study, see Professor F. H. Bohlen, *Studies in the Law of Torts* (1926), Chap. VII.

§ 140.

construct a reservoir on his land. In the course of the work the contractors came upon some old shafts and passages on B's land. They communicated with the mines of A, a neighbour of B, although no one suspected this, for they appeared to be filled with earth. The contractors did not block them up, and when the reservoir was filled the water from it burst through the old shafts and flooded A's mines. It was found as a fact that, while B had not been negligent, yet the contractors had been. A sued B and the House of Lords held B liable.

The litigation originated in an unusual way. It began as an action upon the case (apparently for negligence) at Liverpool Assizes and A secured a verdict, subject to the award of an arbitrator who was afterwards empowered by a Judge's order to state a special case instead of making an award. This he did, and so the case came before the Court of Exchequer which, by a majority, decided in favour of the defendant. The Court of Exchequer Chamber unanimously reversed this decision and held the defendant liable, and the House of Lords affirmed their decision. The judgment of the Exchequer Chamber was delivered by Blackburn, J., and it has become a classical exposition of doctrine (c). "*We think that the true rule of law is, that the person who for his own purposes brings on his lands (d) and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the natural consequence of its escape.*"

This may be regarded as the "rule in *Rylands v. Fletcher*," but what follows is equally important. "He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of *vis major*, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. The general rule, as above stated, seems on

(c) L. R. 1 Ex. 265, 279—280.

(d) Including land over which he has a franchise (which seems to mean a right to use the land founded upon a statute or upon private permission); e.g., for laying pipes in order to carry gas in them: *Northwestern Utilities Ltd. v. London Guarantee, etc. Co., Ltd.*, [1936] A. C. 108, 118; *Charing Cross Electricity Supply Co. v. Hydraulic Power Co.*, [1914] 3 K. B. 772.

principle just. The person whose grass or corn is eaten down by the escaping cattle of his neighbour, or whose mine is flooded by the water from his neighbour's reservoir, or whose cellar is invaded by the filth of his neighbour's privy, or whose habitation is made unhealthy by the fumes and noisome vapours of his neighbour's alkali works, is damned without any fault of his own; and it seems but reasonable and just that the neighbour, who has brought something on his own property which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbour's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should at his peril keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority, this we think is established to be the law whether the things so brought be beasts, or water, or filth, or stench."

In the House of Lords, Lord Cairns, L.C., held the defendant liable because he had made "a non-natural use" of his land, and the noble and learned Lord regarded the judgment of Blackburn, J., as reaching the same result and he entirely concurred in it (e).

Such were the facts and decision in the case. Lord Cairns in the House of Lords thought that the principles applicable were extremely simple, and certainly Blackburn, J., had made them appear so; but in the Court below, Pollock, C.B., had regarded the case as one of great difficulty (f) and there is little doubt that he was right. In truth, the Common Law was faced by a problem for the solution of which there was nothing completely adequate in the existing authorities.

This was not the first time that water had been collected in bulk, but hitherto those who indulged in the practice had generally been powerful bodies, like water or railway companies who had acted under powers given them by legislation which at the same time made them liable for harm done by its escape. But here there was no statutory authority, and although there were several paths that seemed to lead to a solution, none of them went the whole way. Trespass did

(e) L. R. 3 H. L. 330, 338—340.

(f) 3 H. & C. 774, 797.

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not really fit the case because the harm was consequential, not direct. Nuisance was not applicable because a man was not at that date (1862—1865) clearly recognised as liable for the nuisances of his independent contractor: the time was yet to come when in certain circumstances it was held that he might be thus liable (2); nor could the situation be saved by recourse to the blessed vagueness of *sic utere tuo ut alienum non lædas* (4). Negligence was out of the question, for there was none on the defendant's part. A strenuous effort was made by Bramwell, B., in the Court below (i) to stretch another principle to meet this case.—the principle that, if X by excavation withdraws lateral support from the land of Y his neighbour and thereby damages it, he is liable whether he has been negligent or not (k). But here again there was nothing to show that X would be responsible for the misdoings of an independent contractor; and this objection could equally be raised against Blackburn, J.'s examples of liability for cattle-trespass, damage done by savage animals and the escape of filth.

A new rule

Look at the decision of the Exchequer Chamber how we may, it laid down a new principle. True, in the judgment itself it might appear that the Court was making a pontifical statement of existing principle rather than laying down a new rule, for they regarded their own proposition as having been anticipated by Holt, C.J., some 160 years earlier in *Tenant v. Goldwin* (1703) (l), and they cited as instances of it the rules relating to cattle-trespass, the escape of mischievous animals and nuisance by the escape of fumes. But in fact Holt, C.J.'s decision related to the escape of filth and his formulation of principle was limited to that and to cattle-trespass; it was not nearly so sweeping as the rule expressed in *Rylands v. Fletcher*, which was reached by methods extremely characteristic of judicial development of the law,—creating new law behind a screen of analogies drawn from existing law. And whatever views the Exchequer Chamber may have had about their decision, succeeding generations have regarded it as the starting-point of a liability wider than any that preceded it.

(i) *Ante*, § 131.

(h) To which Lord Cranworth inclined: L. R. 3 H. L. 330, 341.

(i) 3 H. & C. 771, 789—790.

(k) *Backhouse v. Bonomi* (1861), 9 H. L. C. 503.

(l) 2 Ld. Raym. 1083.

It seems unsound, then, to dismiss the rule as a convenient summary of the theory underlying several specific torts which had existed long before 1868, or even as the old cattle-trespass rule raised to a higher power (*m*). The substantial advances which it made on the earlier law were two:—

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Scope of extension.

(i) In the direction of things for the escape of which an occupier of land is subjected to strict liability.

(ii) In the direction of the persons for whose defaults in connexion with such escape the occupier is vicariously responsible.

As to (i), the Court took a rule of liability which had been more or less clearly perceived in connexion with the escape of fire, cattle or unruly beasts, and extended it to the escape of mischievous things generally. As to (ii), they held in effect that the occupier from whose land these things escaped and did damage is liable not only for the default of his servant, but also for that of an independent contractor (*n*) and (as later decisions show) for that of any one except a stranger (*o*),

✓ One phrase of Blackburn, J.'s was rather unfortunate, and that was his description of this liability as resting upon "an absolute duty to keep it [*sc.* the water] in at his peril" (*p*). The liability may be strict, but it is not absolute; indeed, the exceptions to the rule indicated by Blackburn, J., himself show that it is not. Moreover, research makes us doubt whether at any time in the whole course of our legal history liability has ever been absolute or that a man has ever acted at his peril in the literal sense of the phrase (*q*). Some rules of Anglo-Saxon law have been urged as an illustration to the contrary, but it is questionable whether that system had any clear theory upon the point; it might say in one breath,

"Absolute" liability a misnomer.

* (*mi* *Contra*, Salmond, Torts, § 137 (4). But it is difficult to agree with the statement as to the four historical grounds of the rule in *Rylands v. Fletcher*. In three of them (liability for trespass, fire and nuisance) it is too strong to say that absence of fault on the defendant's part was no defence. As to trespass and fire, see 42 L. Q. R. (1926), 44—51; as to nuisance, see Viner, *Abr. Nuisance* (H), vol. xvi, 27 *seq.*, where several cases are cited which show that defendant was not liable, because in effect he was "without fault". See, too, Rolfe, *Abr. Nusans*, B 2 (p. 137).

(*n*) It is true that the Exch. Ch. said it was not necessary to decide whether defendants were liable for the default of independent contractors (L. R. 1 Ex. at p. 287), but it is certain that if the action had been for negligence or (at that date) for nuisance, they would not have been liable for the wrongdoing of such contractors. In other words, the Exch. Ch. were extending the law in this respect.

(*o*) 4 Cambridge Law Journal, 192—193.

(*p*) L. R. 1 Ex. at p. 279.

(*q*) The matter is treated at length in 42 L. Q. R. (1926), 37—51.

§§ 140, 141. "Qui inscienter peccat, scienter emendet", but add in the next, "Reum non facit nisi mens rea". So, too, trespass in mediæval law has been cited as an example of a man acting at his peril. No doubt liability for it was strict; no doubt absence of negligence was no excuse; but there are many instances of justification for it in the Year Books such as self-defence, recaption of goods and the like (r). In modern law the phrase "absolute liability" is still less felicitous, although it appears both in the law reports and in other legal literature. But there are recent signs of preference for the more accurate description, "strict liability" (s).

Scope of rule.

§ 141. Scope of the rule.

Like all broad formulations of principle, the rule in *Rylands v. Fletcher* had to be worked out in detail by later decisions, and it has been applied to a remarkable variety of things (t). Of the escape of fire we shall speak later (*post*, § 144). Other things which have been included in the rule are gas (u), explosions (v), electricity (w), oil (a), noxious fumes (b), colliery spoil (c), rusty wire from a decayed fence (d), vibrations (e), poisonous vegetation (f), a flag-pole (g), and a "chair-o-plane" (h). But unless there is an "escape" of the substance from the occupier's land, there is no liability under the rule (i); this was the ground of the House of Lords' decision

(r) *Ibid.*, 44—46.

(s) *Northwestern Utilities, Ltd. v. London Guarantee, etc., Co. Ltd.* [1936] A. C. 108, 118, 119, 126; Scott, L.J., in *Read v. Lyons*, [1945] 1 K. B. 216, 226. See, too, Lord Wright, *Legal Essays*, 141, 361, 369, 401.

(t) Neatly catalogued by Dr. W. T. S. Stallybass in 3 *Cambridge Law Journal*, 382—385.

(u) *Batcheller v. Tunbridge Wells Gas Co.* (1901), 81 L. T. 765.

(v) *Miles v. Forest Rock, etc. Co.* (1918), 31 T. L. R. 500; *Ramham Chemical Works, Ltd. v. Belvedere Fish Guano Co., Ltd.*, [1921] 2 A. C. 465.

(w) *National Telephone Co. v. Baker*, [1893] 2 Ch. 186; *Eastern and S. African Telegraph Co., Ltd. v. Cape Town Tramways Companies, Ltd.*, [1902] A. C. 381.

(a) *Smith v. G. W. Ry.* (1926), 135 L. T. 112.

(b) *West v. Bristol Tramways Co.*, [1908] 2 K. B. 14.

(c) *Att.-Gen. v. Cory Bros., Ltd.*, [1921] 1 A. C. 521.

(d) *Firth v. Bowling Iron Co.* (1878), 3 C. P. D. 254.

(e) *Hoare & Co. v. McAlpine*, [1923] 1 Ch. 167.

(f) *Crouchurst v. Amersham Burial Board* (1878), 4 Ex. D. 5; *Ponting v. Noakes*, [1894] 2 Q. B. 281.

(g) *Shiffman v. Grand Priory, etc.*, [1936] 1 A. E. R. 557.

(h) A species of centrifugal roundabout: *Hale v. Jennings Bros.*, [1938] 1 A. E. R. 579.

(i) *Read v. Lyons & Co., Ltd.*, [1917] A. C. 156. See, too, *Howard v. Furness, etc. Lines, Ltd.*, [1936] 2 A. E. R. 781.

in *Read v. Lyons & Co., Ltd.* (j), where the plaintiff was employed by the Ministry of Supply as an inspector of munitions in the defendants' munition factory, and, in the course of her employment there, was injured by the explosion of a shell that was being manufactured. The defendants were held not liable. There was no negligence on their part and *Rylands v. Fletcher* was inapplicable because there had been no "escape" of the thing that inflicted the injury. "Escape" was defined as "escape from a place where the defendant has occupation or control over land to a place which is outside his occupation or control" (k). The House of Lords emphasised that this was the basis of their decision, but they gave *dicta* on other points which are of considerable importance owing to the full investigation of them in the arguments of counsel in the case. One of these points was the question whether the rule in *Rylands v. Fletcher* applies to injury to the person as well as to injury to property; in two earlier decisions it was held that it does (l), but the Lords regarded the question as an open one (m). Other *dicta* with respect to "natural user" of the land are considered, *post*, p. 483. The speeches of the noble and learned Lords certainly show an inclination not to extend the rule in *Rylands v. Fletcher*, and perhaps also a desire to reduce the range of its present application.

A curious and rather dubious extension of it was to noxious persons in *Att.-Gen. v. Corke* (n). C., the owner of a disused brickfield, allowed persons to bring caravans on the field and to live in them at a weekly rent. Some of them committed in the neighbourhood of the field, but not on it, acts menacing the health of the inhabitants of Bromley. In an action for nuisance, Bennett, J., granted an injunction against C., holding that the principle underlying *Rylands v. Fletcher* was applicable. This decision has been criticised on several grounds, the chief of which is that the rule can scarcely apply to bringing sane adults on land who commit no nuisance there; for that is not an abnormal or non-natural use of land; nor are they things likely to do mischief if they escape (o).

(j) [1947] A. C. 156. (k) Viscount Simon, [1947] A. C. at p. 168.

(l) *Miles v. Forest Rock Granite Co., Ltd.*, [1918] 34 T. L. R. 500; *Shiffman v. Grand Priory, etc.*, [1936] 1 A. E. R. 557.

(m) None of them mentioned the cases cited in note (l), *supra*, except Lord Porter, [1947] A. C. at p. 178.

(n) [1933] Ch. 89.

(o) 49 L. Q. R. (1933), 158—159; 11 Canadian Bar Review, 693—697. Two other criticisms do not seem to be valid. One is that C might have

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There is much force in this, but, on the other hand, it might be urged that people who behaved as these caravanners did were just as noxious in their escape as water or any other potentially harmful thing, and that when C became aware of their propensities he ought to have been in the same position as one who lets his swine stray. Perhaps if the law of nuisance had been pressed a little harder it might have covered the case without praying in aid *Rylands v. Fletcher*. A man who attracts crowds near his land may be liable for nuisance and C was equally the cause of creating an annoyance near his premises (p). However, accepting *Att.-Gen. v. Corke* as it stands, what are its exact limits? How far does it apply to the escape of lunatics from an asylum or of convicts from a prison, or to the mischievous excursions of schoolboys breaking bounds or of undergraduates after a bump supper? Possibly it is a question of degree in each case and the answer may depend on the frequency and quantity of the escape.

Exceptions.

§ 142. Exceptions to the rule.

In *Rylands v. Fletcher* possible exceptions to the rule were no more than hinted and we must look to later decisions for their establishment. They are as follows:—

(1) Natural user.

(1) *Damage due to natural user of the land*.—Lord Cairns, L.C., recognised this in *Rylands v. Fletcher* (q) and he illustrated it by two earlier decisions, the joint effect of which is this. If A conducts mining operations on his own land in such a way as to cause water to flood his neighbour's mine and the inundation is due to mere gravitation, A is not liable, but if the flooding is due to A's pumping, A is liable (r). In later decisions the distinction has been repeatedly recognised (s), and the Courts have hard work in drawing the line.

been liable for false imprisonment if he had restrained the caravanners from leaving his land; that is true, but it is no reason why he should escape liability for what they did when they did leave it: if I beat my dog for biting you, I may be liable for cruelty to an animal, but I am none the less liable in tort to you for the bite. The other is that the caravanners were "strangers" and that harm done by strangers is an exception to the rule in *Rylands v. Fletcher*; but this tends to beg the question. *were they "strangers"?*

(p) *Bellamy v. Wells* (1891), 63 L. T. 635.

(q) L. R. 3 H. L. 330, 338–339.

(r) *Smith v. Kenrick* (1849), 7 C. B. 515; *Baird v. Williamson* (1863), 15 C. B. (N.S.) 376. Cf. *Rouse v. Gravelworks, Ltd.*, [1910] 1 K. B. 489.

(s) We need give examples only from the final courts of appeal: *Rainham Chemical Works, Ltd. v. Belvedere Fish Guano Co., Ltd.*, [1921] 2 A. C. 465 (H. L.); *Rickards v. Lothian*, [1913] A. C. 263 (J. C.).

The phrase "non-natural user" is an inherently vague one and it has been rightly pointed out that it has been rendered none the clearer by a confusion of the distinction between (i) natural and non-natural user of land with the distinction between (ii) things naturally on the land and things artificially there (t). This second distinction is appropriate to a different exception to the rule in *Rylands v. Fletcher*, which is considered in (2) *infra*. As to "non-natural", various other terms have been suggested as substitutes for it, such as "extraordinary" (u), "unusual", "abnormal", but it may be doubted whether they convey any greater significance. However, be the adjective what it may, perhaps the best explanation of it is that given by the Judicial Committee in *Rickards v. Lothian* (v). "It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community" (w). This was the view taken by Viscount Simon in *Read v. Lyons & Co., Ltd.* (x); and, in his opinion, though, as he indicated, it was not necessary to his decision, the making of munitions in a factory at the Government's request in time of war is not a non-natural use of land by its occupier (a). Lord Porter said that "non-natural" must depend on "all the circumstances of the time and place and practice of mankind" (b).

A distinguished American writer has said that the matter must be dealt with as one of social and economic expedience, that it is governed by no hard-and-fast rule, and that its application by the Courts must change with the change of social and economic conditions at different times and in

(t) Dr. W. T. S. Stallybrass in 3 Cambridge Law Journal, 395.

(u) *Ibid.*, 391.

(v) [1913] A. C. 263, 280. In *Collingwood v. H. & C. Stores, Ltd.*, [1936] 3 A. E. R. 200, the C. A. held that *Rylands v. Fletcher* does not apply to the use of water, gas or electricity for ordinary domestic purposes, as distinct from handling of them in bulk in mains or reservoirs.

(w) So, too, *Tilley v. Stevenson*, [1939] 4 A. E. R. 207. See, too, *Thomas and Evans, Ltd. v. Mid-Rhondda Co-operative Society*, [1941] 1 K. B. 381. Dr. Stallybrass, *op. cit.*, 396, inclines to take as the test the "principle of mutual sufferance" stated by Bramwell, B., in *Bamford v. Turnley* (1862), 3 B. & S. 62, 83-84. No doubt that is the general idea underlying the exception, but it is questionable whether it is of any more practical help than the test given above.

(x) [1947] A. C. 156, 169-170. Lord Uthwatt agreed (p. 187).

(a) Lord Macmillan went farther in saying that he would "hesitate to hold that in these days and in an industrial community it was a non-natural use of land to build a factory on it and conduct there the manufacture of explosives" (*ibid.*, 173-174).

(b) *Ibid.*, 176.

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different places (c). And we might add to this that it is possible for the application to vary not merely from one generation to another or from Northumberland to Cornwall, but also here and now with regard to the same piece of land. If I build a house well within the boundary of my land (d), or light a fire to burn rubbish on a calm day in the middle of my field, that is a natural use of my property; but if I build on the edge of a cliff which bounds my land, or light a fire in my garden one yard to windward of my neighbour's haystack, that is a non-natural use and, if harm ensues, I am liable; but we need scarcely go to the rule in *Rylands v. Fletcher* to ascertain that, for it would be the ordinary tort of negligence (e).

(2) Things
not essen-
tially
dangerous.

(2) *Things not essentially dangerous which it is not unusual for a person to have on his land.*—The phrase “essentially dangerous” has been much criticised both by Judges (who nevertheless continue to use it—some of them with approval of it) and by writers (f). It has been truly said that almost anything is potentially dangerous (g) and that the line between “essentially dangerous” and “not usually dangerous” is often evanescent. A gun would generally be reckoned as dangerous in itself, a chair as perfectly safe. Yet the chair, if it has a rotten leg, may be much more perilous than an old musket in the Tower armoury.

Meaning of
dangerous.

But in spite of the uncertainty of the phrase we are only following English law if we adopt it. It is a prominent, indeed an essential, factor in several departments of the law of tort. Under the rule in *Rylands v. Fletcher* it is relevant not only under the head which we are discussing, but in later cases it has been used as equivalent to “likely to do mischief”, which is the phrase used by Blackburn, J., in laying

(c) Professor F. H. Bohlen in *Studies in the Law of Torts* (1926), 350—351.

(d) *Wilkins v. Leighton*, [1932] 2 Ch. 106, seems to have been a case in which the harm was due quite as much to the plaintiff's building operations as the defendant's.

(e) This seems to be the answer to Sir John Salmond's question, *Torts*, p. 515 and note (k).

(f) See Dr. Stallybrass's excellent analysis in 3 *Cambridge Law Journal* (1929), 376—397. The critics do not show much agreement among themselves, for some of them follow Pope in regarding a little learning as a dangerous thing, and others demur to this.

(g) Lord Macmillan in *Read v. Lyons & Co., Ltd.*, [1947] A. C., at p. 172; Lord Porter, *ibid.*, 176.

down the rule (h). Then it appears again in liability for dangerous chattels, dangerous structures and dangerous operations. While we freely admit that, like the word "natural" in exception (1), *supra*, it is incapable of exact legal definition, we would urge that the Courts have been quite right in using both words and that there is a point beyond which it is useless to criticise the vagueness of common expressions. It is the border-line cases that get into the Law Courts, and if greater exactness in defining rights and duties of this sort were possible, a good deal of the business of the Judges would disappear. The root of the whole difficulty is an inevitable lack of precision in defining rights or duties, not an avoidable lack of precision in using words.

There is not a great deal of direct authority on the exception which we are considering (i). But in *Noble v. Harrison* (j) it seems that trees, whether planted or self-sown, were regarded as coming within it and the defendant was held not liable for the collapse of the branch of an apparently sound tree; but this does not apply to the projection of a poisonous tree the foliage of which is eaten by cattle lawfully on adjacent land (k). In *Pontardawe R. D. C. v. Moore-Gwyn* (l), there was no liability for the fall of rocks from an outcrop, which was due to the natural process of weathering.

A decision often cited in support of the exception is *Giles v. Walker* (m), where thistle-seed was blown in large quantities by the wind from the defendant's land to that of the plaintiff; it was held that "there can be no duty as between adjoining occupiers to cut the thistles, which are the natural growth of the soil", and that the defendant was not liable. Upon the facts the decision seems to have been correct so far as the rule in *Rylands v. Fletcher* goes, for all that the defendant had done was to plough up some forest land on which there had previously been no thistles but from which, for some unexplained reason, an immense crop of them at once sprang

(h) The source of this identification is the head-note in *Rylands v. Fletcher* (1868), L. R. 3 H. L. 330.

(i) See Professor A. L. Goodhart in *Essays in Jurisprudence* (1931), Chap. VIII, for an illuminating discussion of the topic. It is not confined to cases on *Rylands v. Fletcher*, but includes those on nuisance and innominate actions.

(j) [1926] 2 K. B. 332.

(k) *Crowhurst v. Amersham Burial Board* (1878), 4 Ex. D. 5. Cf. *Cheater v. Cater*, [1918] 1 K. B. 247.

(l) [1929] 1 Ch. 656.

(m) (1890), 24 Q. B. D. 656.

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up in two successive years (*n*). But the principle seems to have been stated too widely, for circumstances are imaginable in which there would be liability under the rule for not cutting thistles; *e.g.*, if the occupier of land deliberately plants them, in large quantities, for it is not usual to cultivate weeds in bulk on one's land. Moreover, if the claim in *Giles v. Walker* had been for nuisance, it is questionable whether at the present day the defendant would have had any defence, for, as a learned writer has pointed out, even if a nuisance originates on my land without fault on my part I am liable if I continue it (*o*), and, although the defendant could scarcely be responsible for the first year's growth, surely he might have taken steps to prevent the damage in the second year.

Other cases which have been regarded in text-books or mentioned in judgments as illustrative of the exception are *Bland v. Yates* (*p*), where an excessive escape of flies from a manure-heap was held to be a nuisance, and *Stearn v. Prentice Bros., Ltd.* (*q*), where rats were attracted in large numbers to a heap of bones on the defendants' premises and passed from thence to the plaintiff's farm and ate his corn, and the defendants were held not liable because the bones were not kept by them in unusual quantity.

(3) CONSENT
of plaintiff.

(3) *Consent of the plaintiff*.—Where the plaintiff has expressly or impliedly consented to the presence of the source of danger and there has been no negligence on the part of the defendant, the defendant is not liable (*r*). The exception merely illustrates the general defence, *volenti non fit injuria*, and would not have needed special mention here but for the fact that the Court of Appeal and the House of Lords have considered it expedient to take particular notice of it.

(*n*) Professor Goodhart, *Essays in Jurisprudence*, 154, is emphatic that the soil was not in its natural condition, as it was ploughed-up forest land; but it seems odd to regard land that has been cultivated by one of the commonest possible processes as in an unnatural condition.

(*o*) Professor Goodhart, *op. cit.*, 155, citing *Proprietors of Margate Pier v. Town Council of Margate* (1869), 20 L. T. 564, and *Att.-Gen. v. Tod Heatley*, [1897] 1 Ch. 560. The second case carries the point; the first was a decision upon a statute. Professor Goodhart's view is that *Giles v. Walker* can be supported on the ground that thistles and thistledown are not sufficiently dangerous to constitute a nuisance: *ibid.* Under the Corn Production Acts (Repeal) Act, 1921 (11 & 12 Geo. 5, c. 48), s. 1 (c) and Schedule, neglect to destroy certain specified weeds is an offence punishable on summary conviction.

(*p*) [1914], 58 S. J. 612

(*q*) [1919] 1 K. B. 391.

(*r*) *Gill v. Edouin* (1894), 71 L. T. 762; 72 L. T. 579; *Att.-Gen. v. Cory Bros., Ltd.*, [1921] 1 A. C. 521, 538, 543, 545, 550. *Ross v. Fedden* (1872),

(4) *Common benefit*.—Where the source of the danger is maintained for the common benefit of the plaintiff and the defendant, the defendant is not liable for its escape. This is akin to (3), *supra*, and *Bramwell, B., in Carstairs v. Taylor* (s) treated it as the same thing. There A had hired from B the ground floor of a warehouse, the upper part of which was occupied by B. Water from the roof was collected by gutters into a box, from which it was discharged by a pipe into drains. A rat gnawed a hole in the box and water leaked through it and injured A's goods. There was no negligence on B's part. B was held not liable. In *Peters v. Prince of Wales Theatre (Birmingham), Ltd* (t), the Court of Appeal regarded "common benefit" as no more than an element (although an important element) in showing consent in cases of the type of *Carstairs v. Taylor*.

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(4) Common benefit.

In other judicial *dicta* the exception has been regarded as an independent one (u). A curious decision was *Anderson v. Oppenheimer* (a). The plaintiffs were lessees of a floor of X's house. A cistern in the house burst and flooded the floor. X was held not liable on the ground that the cistern was maintained for the common benefit of the plaintiffs and other tenants of other floors. This seems to be an odd reason for the decision. It would have been clear and sufficient to say that the plaintiffs must be taken to have assented to the risk. It would also have been sensible enough, if X and the plaintiffs had occupied the same building, to say that "common benefit" covered the case. But here X was not a joint occupier and, although there were other tenants besides the plaintiffs, how could their existence be relevant to the decision? The fact that *they* had a common benefit with the plaintiffs merely multiplied the number of people likely to be injured; it ought not to have affected the liability or non-liability of X. But the fact is that there has never been a close analysis of "common benefit". At any rate there is none between the consumers of gas and a commercial undertaking, like a public utility company, which supplies it to

L. R. 7 Q. B. 661, and *Kiddle v. City Business Properties, Ltd.*, [1942] 1 K. B. 269, are cases of this type.

(s) (1871). L. R. 6 Ex. 217. So, too, *Northwestern Utilities, Ltd. v. London Guarantee, etc. Co., Ltd.*, [1936] A. C. 108, 120.

(t) [1943] K. B. 73, 78

(u) *E.g.*, *Gill v. Edoum* (1891), 72 L. T. 579.

(a) (1880), 5 Q. B. D. 602.

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them (b). If an explosion occurs owing to its escape, neither this defence nor that of consent of the plaintiff is available to the company, possibly because the persons injured have no choice as to the source of their supply of gas, whereas in cases like *Anderson v. Oppenheimer* they can decide for themselves whether they will accept the arrangement offered to them by their landlord.

Where the thing is brought on the defendant's land purely for his own purposes, *e.g.*, water in excessive quantities for the washing of cinematograph films, the exception has no application and he is liable (c).

(5) Act of stranger.

(5) *Act of stranger*.—If the harm was due to the act of a stranger, the rule does not apply. In *Box v. Jubb* (d), an overflow from the defendant's reservoir was thus caused and he was held not liable; so, too, in *Rickards v. Lothian* (e), where some malicious third person blocked up the waste-pipe of a lavatory basin on X's premises and thereby flooded those of Y.

So far there is no difficulty but, while it is clear that a trespasser is a "stranger" for this purpose, we can only conjecture who else is included in the term. For the defaults of his servants in the course of their employment, the occupier is of course liable; he is also liable for the negligence of an independent contractor unless it is entirely collateral (f); for the folly of an "invitee" (*post*, § 164) in tampering with a potentially dangerous machine provided for his amusement (g); and it may well be for the misconduct of any member of his family on the premises, for he has control over them. Moreover, it has been argued that he ought to be responsible for guests or licensees on his land (h). But perhaps a distinction ought to be taken here. It would be harsh to hold a person liable for the act of every casual visitor who has bare permission to enter his land and of whose propensities to evil he may know nothing; *e.g.*, an afternoon caller who

(b) *Northwestern Utilities, Ltd. v. London Guarantee, etc., Co., Ltd.*, [1936] A. C. 108.

(c) *Western Engraving Co. v. Film Laboratories, Ltd.*, [1936] 1 A. E. R. 106.

(d) (1879), 4 Ex. D. 76. *Wilson v. Newberry* (1871), L. R. 7 Q. B. 31, 33, is perhaps another instance, but illustrates bad pleading still better.

(e) [1913] A. C. 263 (W. Cases, 215).

(f) *Ante*, p. 457.

(g) *Hale v. Jennings*, [1938] 1 A. E. R. 579.

(h) Salmond, *Torts*, § 141 (2).

leaves the garden gate open or a tramp who asks for a can of water and leaves the tap on. Possibly the test is, "Can it be inferred from the facts of the particular case that the occupier had such control over the licensee or over the circumstances which made his act possible that he ought to have prevented it? If so, the occupier is liable, otherwise not".

A case not directly in point, but which gives some ground for thinking that this test is feasible, is *Northwestern Utilities, Ltd. v. London Guarantee, etc. Co., Ltd.* (i). X, a public utility company, supplied a city with natural gas. The city authority in constructing a storm sewer underground, fractured a joint in one of the main pipes of X through which the gas was carried to consumers. The gas consequently percolated through the soil, penetrated the basement of Y's hotel, ignited there and destroyed the hotel. It was held that X was liable. It was true that the negligence of the city authority had caused the escape of the gas, but its operations in making the sewer were so conspicuous and long-continued that there was lack of due care on X's part if it did not know of them, and although X would not have been liable for damage caused, without its default, by the independent conscious act of a third party, yet it was negligent in failing to foresee and guard against the consequences of the operations of the city authority.

In connexion with this exception to the rule in *Rylands v. Fletcher*, we must consider whether the rule applies to a danger created on the premises by the occupier's predecessor in title. It may be inferred from the decision in the *Northwestern Utilities Case* (*supra*) that if the occupier knew, or might with reasonable care have ascertained, that the danger existed, he is liable for its escape. If, however, this condition is not satisfied, it is submitted that he ought not to be liable. There is no direct decision on the point, but the rule itself (*ante*, p. 476) seems to make it essential that the defendant should "bring on his lands" the danger. It is true that this is qualified by the *Northwestern Utilities Case*, but that decision does not apply to an occupier who neither knows nor could reasonably have discovered the existence of a danger created by his predecessor. Moreover, Eve, J., in an *obiter dictum* in *Whitmores, Ltd. v. Stanford* (j) said that the rule in *Rylands*

(i) [1936] A. C. 108.

(j) [1909] 1 Ch. 427, 438.

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v. *Fletcher* does not extend to making the owner of land liable for the consequences of the escape of a dangerous element brought on the owner's land by another person, not for the purposes of the owner but for the purposes of that other person.

(6) Statutory authority.

(6) *Statutory authority*.—The rule in *Rylands v. Fletcher* may be excluded by statute. Whether it is so or not is a question of construction of the particular statute concerned. In *Green v. Chelsea Waterworks Co.* (k), for instance, a main belonging to a waterworks company, which was authorised by Parliament to lay the main, burst without any negligence on the part of the company and the plaintiff's premises were flooded; the company were held not liable. On the other hand, in *Charing Cross Electricity Co. v. Hydraulic Power Co.* (l) where the facts were similar the defendants were held to have no exemption upon the interpretation of their statute. As to the escape of water from reservoirs, even express statutory authority for their construction will not by itself exonerate their undertakers since the Reservoirs (Safety Provisions) Act, 1930 (m). The Dolgarrog Dam disaster of 1925 led to the passing of this Act. A reservoir 1,400 feet above sea level and holding 200 million gallons of water burst and caused great devastation and loss of life.

(7) Act of God.

(7) *Act of God*.—This has already been considered (*ante*, § 16).

(8) Default of plaintiff.

(8) *Default of the plaintiff*.—In *Rylands v. Fletcher* itself, this was noticed as a defence (n). If a person knows that there is a danger of his mine being flooded by his neighbour's operations on adjacent land and courts the danger by doing some act which renders the flooding probable, he cannot complain (o). So, too, in *Ponting v. Noakes* (p), the plaintiff's horse reached over the defendant's boundary, nibbled some poisonous tree there and died accordingly, and it was held that the plaintiff could recover nothing, for the

(k) (1891), 70 L. T. 547.

(l) [1911] 3 K. B. 772. Where there is negligence of the sort occurring in *Northwestern Utilities, Ltd. v. London Guarantee, etc. Co., Ltd.*, [1936] A. C. 108, statutory authority may be no defence.

(m) 20 & 21 Geo. 5, c. 51, s. 7.

(n) (1868), L. R. 3 H. L. 330, 340.

(o) *Lomax v. Stott* (1870), 39 L. J. Ch. 834; *Dunn v. Birmingham Canal Co.* (1872), L. R. 7 Q. B. 244. *Miles v. Forest Rock Granite Co. Ltd.* (1918), 34 T. L. R. 500, would be more helpful if the report had stated more exactly the findings of the jury.

(p) [1894] 2 Q. B. 281; cf. *Chester v. Cater*, [1918] 1 K. B. 247.

damage was due to the horse's own intrusion and, alternatively, there had been no escape of the vegetation. Had it been grown there expressly for the purpose of alluring cattle to their destruction, the defendant would have been liable, not on the ground of *Rylands v. Fletcher*, but because he would have been in the position of one who deliberately sets traps baited with flesh in order to attract and catch dogs which are otherwise not trespassing at all (q).

§§ 142, 143.

If the injury due to the escape of the noxious thing would not have occurred but for the unusual sensitiveness of the plaintiff's property, there is some conflict of authority whether this can be regarded as default of the plaintiff. The Judicial Committee in *Eastern & S. A. Telegraph Co. Ltd. v. Cape Town Tramways Companies, Ltd.*, where an escape of electricity injured a peculiarly sensitive apparatus on the plaintiff's land, held that he could not recover. "A man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or pleasure" (r). This seems only fair, for the rule in *Rylands v. Fletcher* is quite penal enough without extending it to cases like this; nor would the plaintiff be unprotected if there were any negligence on the defendant's part, for the ordinary tort of negligence would then be committed. However, in *Hoare & Co. v. McAlpine* (s), where vibrations from pile-driving caused structural damage to a large hotel on adjoining land, Astbury, J., held it to be a bad plea that the vibrations had this effect only because the hotel was so old as to be abnormally unstable; but he found also that the evidence did not establish that it was in such a condition.

§ 143. Relation of the Rule in *Rylands v. Fletcher* to Nuisance (t).

Rylands v. Fletcher
and nuisance.

Enough has been said to show that the rule in *Rylands v. Fletcher* started its career entangled with at least three other branches of the law—trespass of a highly special kind, escape of mischievous animals, and nuisance (u). It is only with

(q) *Townsend v. Wathen* (1808), 9 East 277.

(r) [1902] A. C. 381, 393.

(s) [1923] 1 Ch. 167. See Sir Frederick Pollock's criticism of this decision in *Torts*, 390, note (g), and 39 L. Q. R. (1923), 145—146.

(t) Adapted from 4 Cambridge Law Journal (1931), 194—197.

(u) And it is quite possible for the same set of facts to ground liability under *Rylands v. Fletcher* and liability for the tort of negligence: *Att.-Gen. v. Cory Bros., Ltd.*, [1921] 1 A. C. 521.

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Inevitable
overlap.

nuisance that we are here concerned, and its implication with *Rylands v. Fletcher* has steadily grown since the decision in that case.

To begin with, let us select what description of nuisance we may, we shall find that it will always cover the type of evil contemplated in *Rylands v. Fletcher*. Hence, the Courts have repeatedly treated the rule in that case as if it were a mere species of the wrong comprised in nuisance. Actions for nuisance have been brought for damage arising from the escape of electricity (a), of sewage (b), of water from a burst main (c), of an explosion from an electric spark (d), of rocks from the side of a hill (e), of a skidding omnibus (f), of mischievous persons (g), and most of them were considered throughout by the Judges who tried them as if they were direct applications of the rule in *Rylands v. Fletcher*. And other actions of nuisance have been regarded as on the same footing for the purpose of applying some exception to the rule (h). So, too, the text-books on nuisance have classified the rule in *Rylands v. Fletcher* as a variety of it (i). Of course, on this hypothesis it is possible to ignore the genus "nuisance", and to rely exclusively on the species "rule in *Rylands v. Fletcher*", and that is exactly what has been done in another case on the escape of electricity (k). Conversely, it is possible to ignore the species and to rely on the genus, and that was exemplified in a decision as to the escape of vibration, which proceeded solely on the ground of nuisance (l). Yet again, the two may be run in double harness (m). In at least one case it is impossible to discover

(a) *National Telephone Co. v. Baker*, [1893] 2 Ch. 186.

(b) *Jones v. Llanrwst U. D. C.*, [1911] 1 Ch. 393; Parker, J., regarded it as "trespass" within *Rylands v. Fletcher*: *ibid.* 402-403.

(c) *Charing Cross, etc. Co. v. London Hydraulic Power Co.*, [1913] 3 K. B. 442.

(d) *Goodbody v. Poplar Borough Council* (1915), 84 L. J. K. B. 1230.

(e) *Pontardawe R. D. C. v. Moore-Gwyn*, [1929] 1 Ch. 656.

(f) *Fletcher Moulton, L.J.*, in *Wing v. L. G. O. Co.*, [1909] 2 K. B. 662, at pp. 665-668.

(g) *Att.-Gen. v. Corke*, [1933] Ch. 89.

(h) *Scrutton, L.J.*, in *Job Edwards, Ltd. v. Birmingham Navigations*, [1924] 1 K. B. 341, 356-357.

(i) Garrett, *Nuisances* (3rd ed. 1908), 138 *seq.*; Pearce & Meston, *Nuisances* (1926), 19-20 (a species of nuisance concerned with "noxious or dangerous" things).

(k) *Eastern and South African Telegraph Co., Ltd. v. Cape Town Tramways Co., Ltd.*, [1902] A. C. 381. So, too, with the escape of creosote: *West v. Bristol Tramways Co.*, [1908] 2 K. B. 14.

(l) *Knight v. Isle of Wight, etc. Co.* (1904), 73 L. J. Ch. 299.

(m) *Hanson v. Wearmouth Coal Co.* (1939), 55 T. L. R. 747.

whether the decision was based on *Rylands v. Fletcher* or on nuisance, but there is nothing surprising in this in view of the convenient formlessness of actions since the Judicature Acts (n).

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It would be incorrect, however, to state baldly that the rule in *Rylands v. Fletcher* is merely a species of nuisance. It is much nearer the truth to say that an accident of definition, or lack of definition, of nuisance may bring the same set of facts within either kind of liability, but that they differ notably in details, and that it is only where none of these differences of detail is in question that it is immaterial whether the action is for nuisance or is on the rule in *Rylands v. Fletcher*. Nuisance and that rule are related to one another as intersecting circles, not as a segment of a circle to the circle itself. Nor do the decided cases warrant any other view. If John Smith's artificial reservoir bursts and floods William Brown's land, it does not matter whether Brown sues Smith for nuisance or for breach of the rule in *Rylands v. Fletcher*. Smith is liable either way. But it does matter a great deal if the reservoir were erected by an independent contractor, or if a violent storm burst the reservoir, or if John Smith were not in occupation of his land, but had let it to Green; for in all these points the law of nuisance is not the same as the rule in *Rylands v. Fletcher*.

But not
entire
coincidence.

The differences between the two torts may now be summarised :—

Differences.

(i) Many nuisances are quite outside the rule in *Rylands v. Fletcher*, e.g., ordinary obstruction of a highway (o), defective fencing (p), watching and besetting workmen (q), and many forms of interference with servitudes. Again, noise always seems to have been treated as a nuisance pure and simple (r).

(ii) Nuisance is confined to injuries which primarily affect

(n) *Ballard v. Tomlinson* (1884), 26 Ch. D. 194; (1885), 29 Ch. D. 115 ("action to restrain the defendants from polluting the water coming to a well belonging to the plaintiff").

(o) *Campbell v. Paddington Borough Council*, [1911] 1 K. B. 869; *Att. Gen. v. Brighton, etc. Association*, [1900] 1 Ch. 276.

(p) *Harrold v. Watney*, [1898] 2 Q. B. 320; *Barker v. Herbert*, [1911] 2 K. B. 633.

(q) *Lyons v. Wilkins*, [1899] 1 Ch. 255.

(r) Whatever be the reason for this, it is not because *Rylands v. Fletcher* refers only to the escape of *tangible* matter, for it applies to vibrations, which can scarcely be described as tangible.

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the use or enjoyment of land. The rule in *Rylands v. Fletcher* is not limited in this way. Thus it applies to injuries sustained by a non-occupier of land owing to the escape of the defendant's fierce animal, and to harm done to the electric cables of the plaintiff, who had no interest in the land where the cables were laid, by the escape of water from the defendant's mains (s).

(iii) Nuisance may be legalised by prescription. This cannot apply to all breaches of the rule in *Rylands v. Fletcher*, but where the injury is of a continuing character and is also a nuisance which has been legalised by prescription, it would be artificial to hold that the plaintiff could nevertheless sue for breach of the rule.

(iv) The act of God is a defence perhaps peculiar to *Rylands v. Fletcher*. Inevitable accident constitutes a similar (but not identical) defence to nuisance (t).

(v) In nuisance, a non-occupier of the land on which the injury originates may be liable; e.g., the builder of a wall on land occupied by X has been held liable for thereby obstructing access to Y's private market (a); and exceptionally a landlord may be liable for a nuisance on premises in the occupation of a tenant (b). On the other hand, occupation of land, or the holding of some franchise over it (c), by the defendant is essential to his liability in *Rylands v. Fletcher* (d).

(vi) The defendant in *Rylands v. Fletcher* is liable for the wrongs of an independent contractor, but in nuisance this is not so, apart from the exceptions which we have already noticed (*ante*, p. 457).

(vii) It is doubtful whether unusual sensitiveness of the plaintiff's property is a defence to an action of the *Rylands v. Fletcher* type; but it certainly is to an action for nuisance (e).

(s) *Charing Cross Electricity Supply Co. v. Hydraulic Power Co.*, [1911] 3 K. B. 772. See, too, Pollock, Torts, 391—392, and Salmond, Torts, 519.

(t) *Ante*, § 15. Sir Frederick Pollock in 143 R. R. Pref. v—vi; Salmond, Torts, § 5 (5).

(a) *Thompson v. Gibson* (1841), 7 M. & W. 456.

(b) *Ante*, pp. 461—466.

(c) *Northwestern Utilities, Ltd. v. London Guarantec, etc. Co., Ltd.*, [1936] A. C. 108, 118; *Charing Cross Electricity Supply Co. v. Hydraulic Power Co.*, [1914] 3 K. B. 772 (*ante*, p. 490).

(d) *Rainham Chemical Works, Ltd. v. Belvedere Fish Guano Co., Ltd.*, [1921] 2 A. C. 465; *St. Anne's Well Brewery Co. v. Roberts* (1928), 140 L. T. 1, 5—6, 9; cf. Dr. W. T. S. Stallybrass's article on this case in 45 L. Q. R. (1929), 118.

(e) *Ante*, p. 444.

(viii) It has also been held that in *Rylands v. Fletcher* §§ 143, 144. liability is based on unnatural use of his land by the defendant, and on the object being dangerous in itself (f). Whatever be the meaning of these phrases (g), it is doubtful in what sense, if any, the first of these restrictions applies to nuisance; and it is clear that the second does not, for the defendant in nuisance may quite well be liable even if what has caused the injury is not dangerous in itself.

§ 144. Fire.

Fire.

Liability for damage done by the escape of fire had better be considered here, and it cannot be intelligibly stated without a sketch of its history (h).

There were originally three possible actions for such damage: (1) Writ of trespass *vi et armis* (i). (2) Ordinary action upon the case; misadventure seems to have been no defence here (k). (3) Special action of trespass upon the case for negligently allowing one's fire to escape in contravention of the general custom of the realm (l). Now (1) and (2) were never popular and we hear almost nothing of them in the reports. But (3) was much better known—we first read of it in *Beaulieu v. Finglam* (1401) (m)—and it became the usual remedy. Historically it had nothing to do with any of the following things: (i) Nuisance, or any of the remedies for nuisance; in fact it was carefully segregated from these in the literature of the law (n). (ii) Negligence as a tort, for negligence did not become a tort until the early nineteenth century. The allegation in the action for fire that the defendant “*tam negligenter ac improvide*” kept his fire that it escaped, referred to negligence in its older sense,—one mode of committing a tort. Now that negligence is also an independent tort, there is no reason why damage done by the escape of fire should not be reckoned as an instance of it, if the plaintiff prefers to take that course (o). (iii) The rule in

(f) *Noble v. Harrison*, [1926] 2 K. B. 332. (g) *Ante*, pp. 484—486.

(h) Detailed in 42 L. Q. R. (1926), 46—50, and 4 Cambridge Law Journal (1931), 203—206.

(i) 42 Lib. Ass. pl. 9

(k) *Anon.* (1582), Cro. Eliz. 10.

(l) Identified by Sir Frederick Pollock with the Common Law: Torts, 399—400.

(m) Y. B. Pasch. 2 Hen. 4, f. 18, pl. 6

(n) *E.g.*, the Abridgments of Rolle, Viner, Comyns and Bacon.

(o) Bankes, L.J., in *Musgrove v. Pandelis*, [1919] 2 K. B. 43, 46; Scrutton, L.J., in *Job Edwards, Ltd. v. Birmingham Navigations*, [1924] 1 K. B. 341, 361.

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Rylands v. Fletcher, which was not formally laid down until 1868.

Now it was after the formulation of the rule in *Rylands v. Fletcher* that these remedies, which had been tolerably distinct until then, tended to become entangled with one another.

First, the rule in *Rylands v. Fletcher* was occasionally regarded as a mere variant of liability for nuisance (p).

Secondly, shortly after the decision in *Rylands v. Fletcher* in the Court of Exchequer Chamber (q), the Court of Queen's Bench held in *Jones v. Festiniog R. Co.* that fire was to be included in "things likely to do mischief if they escape" (r), and that it thus came within the rule in *Rylands v. Fletcher*; and this has been followed in later decisions (s). One might infer from this that the rule in *Rylands v. Fletcher* has entirely absorbed the special action of trespass on the case for fire (subject to an Act of 1774 which is discussed below). And the inference is favoured by the fact that the defendant has been held liable for the default of an independent contractor (t), which may be regarded as one of the hall-marks of the strict liability in *Rylands v. Fletcher*. Yet it is doubtful whether the absorption is complete. For instance, inevitable accident is perhaps in some instances a defence to the action for fire (even apart from the Act of 1774); *Sochacki v. Sas* (post, p. 500); but it is probably no defence under the rule in *Rylands v. Fletcher*, although act of God is a defence.

Thirdly, it was assumed rather than actually decided in 1924 in *Job Edwards, Ltd. v. Birmingham Navigations* (u), and in 1946 was actually decided in *Spicer v. Smee* (v) that the escape of fire may be a private nuisance. The idea was in effect a novelty in the earlier of these two cases (a), and the decision in this and other respects flattens out

(p) *Ante*, p. 492.

(q) (1866), L. R. 1 Ex. 265.

(r) (1868), L. R. 3 Q. B. 733, 736. Blackburn, J., was one of the Judges.

(s) *Powell v. Fall* (1880), 5 Q. B. D. 597; *Gunter v. James* (1908), 24 T. L. R. 868; *Musgrove v. Pandelis*, [1919] 2 K. B. 43; *Mansel v. Webb* (1919), 88 L. J. K. B. 323; *Job Edwards, Ltd. v. Birmingham Navigations*, [1924] 1 K. B. 341, 351—352 (Bankes, L.J.); *Collingwood v. Home and Colonial Stores, Ltd.* (1936), 155 L. T. 550.

(t) *Black v. Christchurch Finance Co.*, [1894] A. C. 48.

(u) [1924] 1 K. B. 341.

(v) [1946] 1 A. E. R. 489.

(a) 4 Cambridge Law Journal, 205.

somewhat violently the historical perspective of the topic. The action was to determine who was liable for the expense of extinguishing a fire which all parties admitted to be a nuisance. The fire had been caused by the deposit of some refuse by a trespasser on land belonging to, but unoccupied by, A. The fire spread slowly and threatened to extend to B's land. B asked A to put it out. A refused, but allowed B to enter his land and extinguish it. A paid to B half the cost of this, without prejudice, and then sued B to recover payment. The Court of Appeal by a majority held that A's claim was good because he had neither caused nor continued the fire, nor had he been negligent with respect to it. Now the neat question seemed to be, "Who was bound to abate the nuisance?" Yet the problem was discussed in at least three other aspects; first, as of the *Rylands v. Fletcher* type of liability with which the Court identified nuisance for this purpose (b); secondly, as liability under the action for escape of fire (c); thirdly, possibly as liability for the tort of negligence.

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The result at the present day seems to be that damage resulting from the unintentional (d) escape of fire is redressible by any of the following remedies: (i) The special action of trespass upon the case for negligent keeping. (ii) An action of the *Rylands v. Fletcher* type; query whether this has totally absorbed this first action? (iii) An action for nuisance. (iv) An action for negligence. Present law.

We can now state the existing law under two heads, by statute and at Common Law.

(1) *Fires beginning accidentally on the defendant's land.*—The Fires Prevention (Metropolis) Act, 1774 (e), provides that no action shall be maintainable against any one on whose building or estate a fire shall accidentally begin. This section of the Act is of general application and is not limited to London (f). "Accidentally" has been the subject of judicial interpretation. It certainly will not exempt from Statutes.

(b) But how can the fire be said to have "escaped"?

(c) Bankes, L.J., telescoped this into nuisance (a historical distortion) and nuisance into liability under *Rylands v. Fletcher*: [1924] 1 K. B. 341, 352.

(d) If the damage is intentional it is trespass or assault; e.g., deliberately throwing a lighted match on a haystack or a lighted firework in a man's face.

(e) 14 Geo. 3, c. 78, s. 86.

(f) *Filliter v. Phippard* (1847), 11 Q. B. 347.

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liability one who has been negligent (g); nor even one who was guilty of no negligence so far as the origin of the fire was concerned but who has been negligent in letting it spread. In *Musgrove v. Pandelis* (h) X occupied rooms over a garage and let part of the garage to Y, who kept a car there. Y's servant, Z, who had little skill as a chauffeur, started the engine of the car. Without any fault on his part the petrol in the carburettor caught fire. If he had acted like any chauffeur of reasonable competence, he could have stopped the fire by turning off the tap connecting the petrol tank with the carburettor. He did not do so and the fire spread and burned X's furniture and rooms. X sued Y, who was held liable, for the fire which did the damage was not that which broke out in the carburettor but that which spread to the car; and this second fire or continuing fire (whichever is the correct phrase) (i) did not "accidentally begin". The first fire no more really caused the damage than a housemaid striking a match to light the kitchen fire causes the fire which ultimately burns down the house. Another ground for the decision was that a car with petrol in its tank was a dangerous thing to bring into a garage within the principle of *Rylands v. Fletcher* (k), but this has been doubted (l). On the other hand, if there has been no negligence at all in the origin or spread of the fire, there is no liability. In *Collingwood v. Home and Colonial Stores, Ltd.* (m), a fire broke out on the defendants' premises and spread to those of the plaintiff; it originated in the defective condition of the electrical wiring on the defendants' premises, but, as there was no negligence on their part and no evidence that any skilled person had found the installation defective, they were held not liable; nor was *Rylands v. Fletcher* (n) applicable, for the installation of electric wiring, whether for domestic or trade purposes, was a reasonable and ordinary use of premises.

Railway engines.—Other statutes deal with the escape of

(g) Same case; also *Vaughan v. Menlove* (1837), 3 Bing. N. C. 468.

(h) [1919] 2 K. B. 43; applied in *Mulholland & Tedd, Ltd. v. Baker* (1939), 161 L. T. 20.

(i) [1919] 2 K. B. at p. 51, and *Serutton, L.J.*, in *Job Edwards, Ltd v. Birmingham Navigations*, [1924] 1 K. B. 341, 361.

(k) (1868), L. R. 3 H. L. 330.

(l) By *Romer, L.J.*, in *Collingwood v. Home and Colonial Stores, Ltd* (1936), 155 L. T. 550, 553.

(m) Last note.

(n) (1868), L. R. 3 H. L. 330.

sparks from railway engines. Where, as is commonly the case, a railway is constructed and worked under statutory powers, and there is no negligence in the construction or use of locomotives, there is no liability for fires caused by the escape of sparks from locomotives; such was the decision in *Vaughan v. Taff Vale Ry. Co.* (o), where the defendants had taken every precaution that science could suggest to prevent injury of this sort, and it was held that as Parliament had authorised the use of locomotives it was consistent with policy and justice that the defendants, in the absence of any negligence, should not be liable. But this view was rather hard upon farmers with crops adjacent to a railway line and a compromise was effected by the Railway Fires Acts, 1905 and 1923 (p), which cast upon railways a liability not exceeding £200 for damage caused to agricultural land or agricultural crops for fire arising from the emission of sparks or cinders from their locomotives, although the locomotive was used under statutory powers. Presumably this puts the liability of the railway company up to £200 on the same level as that fixed by the Common Law and, on the other hand, does not deprive it of any of the defences pleadable at Common Law which are discussed below; e.g., default of the plaintiff (q).

(2) *Other fires*.—As has been stated, it is possible to sue at common law for the escape of fire either by the action for negligent keeping, or under the rule in *Rylands v. Fletcher*, or for nuisance, or for the tort of negligence. We can limit ourselves to the first of these, leaving it open whether it is now a species of the second. The principles of the third and fourth have been discussed elsewhere. It is repeatedly said that at Common Law a man must keep in his fire “at his peril”, but research shows that we cannot be sure that at any period in the history of the Common Law a man was absolutely liable for the escape of his fire (r). The action for negligent keeping always alleged that the defendant had guarded his fire “tam negligenter ac improvide” that it had spread.

(o) (1860), 5 H. & N. 679.

(p) 5 Edw. 7, c. 11, s. 1; 13 & 14 Geo. 5, c. 27, s. 1.

(q) *Groom v. C. W. Ry.* (1892), 8 T. L. R. 253, 256. In *Parker v. L. N. E. Ry.* (1945), 175 L. T. 137, defendants were held liable, as they had not adopted a modern invention used by other railways.

(r) 42 L. Q. R. (1926), 46—50.

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Exactly what "negligenter" meant can only be conjectured, for the old authorities are confused, but it certainly excluded liability where the fire spread or occurred (i) by the act of a stranger; a man was not responsible for that, although he was for the default of his servant, his wife, his guest, or one entering his house with his leave or assent (s); (ii) by misadventure which, to anticipate a modern term, is equivalent to inevitable accident. This exception was established with some hesitation. It was recognised by the time of Elizabeth (t). In 1697, *Tubervil v. Stamp* (u) tended to unsettle it, for it was held that liability extended to fire originating in a field, e.g., for the purpose of burning stubble, just as much as to one beginning in a house; but that if a sudden storm had arisen which the defendant could not stop. that might be shown in evidence. Collateral reports indicate ill-defined notions of the meaning of negligence in this connexion (a). However, the Act of 1774 negatived liability for accidental fires beginning on the defendant's land, though it is not clear whether at that date this signified inevitable accident. The extent to which inevitable accident is, at the present day, a defence in cases outside the Act of 1774 is somewhat doubtful. It certainly is not with respect to the escape of sparks from locomotive engines, whether on a railway or on the highway, which are not protected by some statutory authority (b). But the decisions were based to some extent on such engines being highly dangerous machines and it is questionable whether they go the length of holding that inevitable accident can never be a defence. Apart from this, *Sochacki v. Sas* (c) shews that in some circumstances inevitable accident may be a defence. X, a lodger in Y's house, left his room with an ordinary fire alight in the fireplace. During his absence a fire broke out in the room, probably owing to a spark jumping out of the fireplace. The fire spread to a neighbouring room and caused much damage. Lord Goddard, C.J., held that X was not liable to Y, for there was no negligence on his part, though there was no fire-guard or fender

(s) *Ibid.*, where all the authorities are examined.

(t) *Anon.*, Cro. Eliz. 10.

(u) 1 Salk. 13.

(a) Comb. 459; Carthew 425; 42 L. Q. R. 49, note 5.

(b) *Jones v. Festiniog Ry.* (1868), L. R. 3 Q. B. 733 (railway engine); *Powell v. Fall* (1880), 5 Q. B. D. 597 (traction engine).

(c) [1947] 1 A. E. R. 344.

in front of the grate. *Res ipsa loquitur* was inapplicable, for the fire was not too large for the grate; nor was the rule in *Rylands v. Fletcher* applicable, for X had used his room in an ordinary and natural way. Again, suppose that a motor car skids without any negligence on the part of the driver while it is passing a brazier containing live coke which has been lawfully and carefully placed on the highway in connexion with road repairs, and suppose that the car knocks over the brazier and a fire occurs in consequence which destroys property of a third person; is any one to be held liable for the damage? Whatever may be the answer to this question, we are probably safe in saying that if the rule relating to escape of fire is to be regarded as a special instance of the rule in *Rylands v. Fletcher*, then the defences which are pleadable in the latter case are also pleadable in the former; if that be so, the act of God would be one such defence even if inevitable accident would not be (d); so, too, would natural user of the premises from which the fire escaped (*Sochacki v. Sas*, *supra* (e)).

(d) *Black v. Christchurch Finance Co., Ltd.*, [1894] A. C. 48, indicates that if the fire were due to the act of a trespasser, the occupier is not liable.

(e) In *Ekstrom v. Deagon*, [1946] 1 D. L. R. 208, the Supreme Court of Alberta held that X was liable to Y under the rule in *Rylands v. Fletcher* for a fire on Y's premises caused by the escape of petrol from X's car which X had brought on to Y's premises for repair. The decisions in the English cases cited by the Court in support of their decision do not seem to go so far (*Charing Cross Co. v. Hydraulic Power Co.*, [1914] 3 K. B. 772; *Northwestern Utilities, Ltd. v. London Guarantee Co., Ltd.*, [1936] A. C. 108).

CHAPTER XX

STRICT LIABILITY. ANIMALS (a)

§§ 145, 146.

Why a
separate
heading.

§ 145. Except in two respects there is no reason why a separate chapter should be allotted to animals in a book on the law of tort. True, the law relating to them impinges upon our daily life much more than the ordinary man realises. There are some forty ways in which he may be brought in contact with the law through his dog; and horses, fish and game form sections of respectable size in legal encyclopædias. But in the law of tort it is only straying cattle and animals of savage disposition that call for any special notice, the first because of its historical prominence in the dawn of nearly every system of law, the second because of the stringent liability which has been attached, especially in modern times, to dangerous things. Both may be bracketed under "strict liability" akin to the rule in *Rylands v. Fletcher* (b) but with considerable differences in the detailed rules connected with them.

Three forms
of liability.

§ 146. It cannot be said too early or too often that liability for animals is distributable under three entirely separate heads, for occasionally even Judges have forgotten this, and thus the law has developed, and still remains, in some confusion. A problem on injury done by an animal is never completely solved unless it is considered under each of these heads; for it may well be that, although there is no liability under one of them, there is under either of the other two. The three heads are :

- (1) Ordinary liability in tort.
 - (2) The cattle-trespass rule.
 - (3) The rule as to *scienter* (c).
- We must develop these in detail.

(a) The topic is covered by the valuable and exhaustive monograph of Dr. Glanville Williams on *Liability for Animals* (1939). The book is frequently cited in this chapter.

(b) *Ante*, Chap. XIX.

(c) We must apologise once for all for frequent use of the barbarous phrase, "the *scienter* rule", but only a periphrasis of some length and clumsiness would obviate it.

§ 147. Ordinary liability in tort.

§ 147.

There are many possible ways in which a tort may be committed through the instrumentality of an animal under one's control (d); but the fact that the agent happens to be animate instead of inanimate is immaterial. Your liability is neither greater nor less whether it be a stick or a stone or any living thing with which you have inflicted the injury. Thus you can be liable for nuisance through the agency of your animals, just as you can be for nuisance through the agency of anything else which belongs to you. A man who keeps pigs too near his neighbour's house commits a nuisance, but that is not solely because they are pigs. He would commit a nuisance just as much as if what he owned were a manure-heap and not pigs. There is no independent tort called "nuisance by pigs" or "nuisance by animals" (e).

Ordinary liability in tort.

Again, if a dog-owner deliberately sets his dog on a peaceable citizen, he is guilty of assault and battery in the ordinary way just as if he had flung a stone at him or hit him with a cudgel. So, too, if a man teaches his parrot to slander any one, that is neither more nor less the ordinary tort of defamation than if he prefers to say it with his own tongue rather than with the parrot's.

So, too, ordinary trespass can be committed by means of animals. Trespass by beasts so often takes the form of cattle-trespass (with which we deal separately) that one does not meet with many ordinary actions for trespass in the law reports. However, an indirect example of it is *Paul v. Summerhayes* (f), where fox-hunters persisted in riding over the land of a farmer in spite of his express prohibition, and they were held to have committed trespass.

The tort of negligence can also be committed by means of animals. If Peter, while he is riding his horse at a furious pace, knocks over and injures John, John can sue him for negligence; but nothing turns upon the fact that what he was riding was a horse. If it had been a motor-cycle he would have been in just the same position. There is no special form of negligence called "negligence through animals" any

(d) *Brackenborough v. Spalding U. D. C.*, [1942] A. C. 310, 315, 317, 324 (post, p. 507) touched upon control.

(e) *Pitcher v. Martin*, [1937] 3 A. E. R. 918, illustrates a nuisance committed through the agency of a dog.

(f) (1878), 4 Q. B. D. 9.

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more than there is a special kind called "negligence through motor vehicles".

We say that the tort of negligence is possible through the agency of animals, and there is no doubt that that is the law now. But until the present century it could not be dogmatically asserted, for doubts arose from two sources. First, some of the Judges had ill-defined ideas on the question whether negligence was still simply a mode of committing a tort or whether, in addition to this, it had also become an independent tort (*g*). Secondly, some of them mixed up liability in the *scienter* type of action with questions of negligence (*h*). But there is abundant later authority to shew that the action for negligence for harm done through animals is quite distinct from both the cattle-trespass rule and the *scienter* rule (*i*).

Animals
straying to
highway.

Animals straying to highway.—One qualification on this liability for the tort of negligence is that if animals *mansuetæ naturæ* (*i.e.*, ordinary tame animals) stray from adjacent land on to the highway, the person responsible for them (whom for brevity's sake we may call their owner) may be liable for trespass to the owner of the soil of the highway, but if they do damage to any one else or to his goods their owner is not liable. The reason for this is that in early times very few roads were fenced from the adjacent land and it would have been an intolerable burden on the owner of beasts if he had been compelled to prevent them from straying to the highway. It is clear from the decision of the Court of Appeal in *Hughes v. Williams*, [1943] K. B. 574, that the above qualification is law, although the Court regarded it

(*g*) In *Cox v. Burbidge* (1863), 13 C. B. (N.S.) 430, Erle, C.J., favoured the latter view, Williams, J., the former. In *Lee v. Riley* (1865), 18 C. B. (N.S.) 722, there was a similar division of opinion between Montague Smith and Byles, JJ. In *Ellis v. Loftus Iron Co.* (1874), L. R. 10 C. P. 10, 13–14, Keating and Brett, JJ., seemed to regard negligence merely as one possible way of committing trespass.

(*h*) Pollock, C.B., and Bramwell, B., in *Cooke v. Waring* (1863), 2 H. & C. 332; Crompton, J., in *Stiles v. Cardiff Steam Navigation Co.* (1864), 33 L. J. Q. B. 310; Bankes, J., in *Jones v. Lee* (1911), 106 L. T. 123; Scrutton, L.J., in *Sycamore v. Ley* (1932), 147 L. T. 342, 344, seemed to ignore the possibility of the action for negligence, but Greer, L.J., at p. 345, clearly recognised it.

(*i*) *Higgins v. Searle* (1909), 100 L. T. 280; *Bradley v. Wallaces, Ltd.*, [1913] 3 K. B. 629, 637; *Manton v. Brocklebank*, [1923] 2 K. B. 212; *Gayler & Pope, Ltd. v. Davies & Son, Ltd.*, [1924] 2 K. B. 75; *Fardon v. Harcourt-Rivington* (1932), 146 L. T. 391; *Piteher v. Martin*, [1937] 3 A. E. R. 918; *Lathall v. Joyce* (1939), 55 T. L. R. 994; *Aldham v. United Dairies (London), Ltd.*, [1940] 1 K. B. 507; and finally the House of Lords in *Brackenborough v. Spalding U. D. C.*, [1942] A. C. 310 (*post*, p. 507).

as unsatisfactory and as open to reconsideration by the House of Lords (k). However, in *Searle v. Wallbank*, [1947] A. C. 341 (post, p. 507), the House of Lords had no doubt that the qualification is law.

The exact scope of the qualification is, however, uncertain. First, as to the kind of animals which it includes. Certainly, it covers horses (l), kine (m), swine (n) and sheep (o), and probably it extends to fowls, dogs and any other tame animals (p). Next, it seems to apply not only to the escape of such animals from land which is separate from the highway, but also to their straying from the strip of grass, which frequently borders the highway, on to the road itself (q). Then, with respect to land which is separate from the highway, the exception is not limited to the owner of the land but applies also to one who is an occupier or even a mere licensee of the land whose animals escape from it. But the exemption certainly does not apply where the animal is of a savage disposition which is known (e.g., a fierce dog), or presumed to be known (e.g., a tiger), to its owner and the damage done by it is a consequence of that (r). This is merely an

(k) A view also taken by Viscount Simon, L.C., and Lord Wright in *Brackenborough v. Spalding U. D. C.*, [1942] A. C. 310, 316, 321 (post, p. 507). There are dicta in earlier decisions that contradict each other as to the existence of the qualification; see, on the one hand, Lord Atkin in *Fordon v. Horcourt-Rivington* (1932), 146 L. T. 391, 392; Greer, L.J., in *Sycamore v. Ley* (1932), 147 L. T. 342, 345; Vaughan Williams, L.J., in *Ellis v. Banyard* (1911), 106 L. T. 51, 52; on the other hand, Buckley, L.J., *ibid.*, 53; dicta in *Higgins v. Searle* (1909), 100 L. T. 280, and in *Hadwell v. Righton*, [1907] 2 K. B. 345. There are other dicta which, although they assume that the qualification exists, disagree as to whether it would protect an owner who lets animals escape from his land in such large numbers as to make obstruction of the highway inevitable; cf. Vaughan Williams and Kennedy, L.J.J., in *Ellis v. Banyard* (1911), 106 L. T. 51, 52, 53, and Cozens-Hardy, M.R., and Pickford, L.J., in *Heath's Garage, Ltd. v. Hodges*, [1916] 2 K. B. 370, 376, 379, 380—381. However, the actual decisions in which these doubts appear relate either to the escape of animals already on the highway (e.g., dogs in motor cars), or to the absence of any negligence, or to remoteness of the damage done. A serious result of the law is that, while X may be liable in tort for putting an inanimate object on the highway so that it injures Y, X is not liable for letting an animal, e.g., a sow, stray from his land to the highway and go to sleep there (at any rate if it is in the country) and cause similar injury: *Higgins v. Searle* (1909), 100 L. T. 280.

(l) *Cox v. Burbidge* (1863), 13 C. B. (N.S.) 431.

(m) *Ellis v. Banyard* (1912), 106 L. T. 51.

(n) *Higgins v. Searle* (1909), 100 L. T. 280.

(o) *Heath's Garage, Ltd. v. Hodges*, [1916] 2 K. B. 370.

(p) *Hadwell v. Righton*, [1907] 2 K. B. 345, 348, 349; *Heath's Garage, Ltd. v. Hodges*, [1916] 2 K. B. 370, 382; *Deen v. Davies*, [1935] 2 K. B. 282, 288 (W. Cases, 218).

(q) *Cox v. Burbidge* (1863), 13 C. B. (N.S.) 431.

(r) Recognised in *Deen v. Davies* (supra) as undisputed.

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application of the *scienter* rule (*post*, § 152); but in this connexion knowledge that any animal *mansuetæ naturæ* is prone to stray will not entail liability under the *scienter* action, for straying is not a vice in domestic animals, but is simply part of the nature of even the most peaceable of them.

Doubt as to liability for negligence.

A much more troublesome matter is that, while it seems clear that in some circumstances negligence on the part of the owner will disentitle him from claiming that he is not liable for injuries done by his animals straying from his land to the highway, the exact limits of this are uncertain. The following decisions are most in point on this.

In *Heath's Garage Ltd. v. Hodges* (s) A was driving his car on the highway when two sheep belonging to B jumped from a bank on the roadside and one of them collided with and overturned the car. The sheep had emerged from a gap in a hedge fencing a field occupied by B and the hedge was in a defective state. The Court of Appeal held that B was not liable in tort to A, first, because in ordinary circumstances on an ordinary highway a man is under no duty to prevent harmless animals from straying to the highway and it is immaterial whether the action be based on negligence or on nuisance to the highway (t); secondly, because even if there be such a duty, the damage here was too remote.

In *Deen v. Davies* (u), X rode his pony, which was normally a quiet animal, to a large town, put it up in a stable there and left it insecurely fastened. Thence it escaped to the highway and caused injury to Y there. The Court of Appeal held that X was liable in tort to Y, but they differed in their reasons. All three Judges inclined to the view that the particular circumstances of each case of this kind must be taken into account in deciding whether there be negligence; but while Slesser, L.J., appeared to think that in a large town the owner of cattle is liable if he negligently lets them stray on the highway (a), Romer, L.J., regarded X as liable because he had been negligent in his care of the pony while

(s) [1916] 2 K. B. 370. See criticisms of this case and the next in Williams, *op. cit.*, 386—392.

(t) Lord Cozens-Hardy, M.R., [1916] 2 K. B., at p. 376; Pickford, L.J., and Neville, J., are not inconsistent with this, although some of their *ratio* are wider.

(u) [1935] 2 K. B. 282 (W. Cases, 218).

(a) [1935] 2 K. B. 282, 286. It is difficult to be sure that this was the view of the learned L.J., or whether he adopted the same reason as Romer, L.J. At pp. 288, 290, the report is not even grammatical.

it was on the highway, for his careless tethering of the beast in the stable was all part of his conduct of it along the highway (b); this view would make *Deen v. Davies* of no import on the question of beasts straying to the highway (which is the problem we are considering) however relevant it may be to the liability for animals already lawfully on the highway,—a matter more germane to the cattle-trespass rule than to this section.

In *Brackenborough v. Spalding U. D. C.* (c), A sent his cattle to the Council's market-place to be graded. They were under the charge of A's servants who, by the direction of an official, placed them in a pen that was inadequate to prevent the escape of cattle. One of A's steers escaped to the highway and knocked over and killed B there. His widow sued the Council for negligence. The House of Lords held that they were not liable, because the proprietors of a market owe no duty to the people using the market to provide adequate pens and much less do they owe any duty in this respect to the public using the adjacent highway. The provision of pens is merely for the convenient conduct and management of the market. It was also held that A's servants still had custody of his cattle, but that was not the basis of the decision and no opinion was expressed as to A's liability (d). No reliance was placed by the defendants on the *Heath's Garage Case* (*supra*) and the House of Lords as a whole did not pass upon the limits of that decision (e).

In *Hughes v. Williams* (f), Lord Greene, M.R., recognised that negligence may, in some cases, make the owner liable for injuries done by animals straying from his land to the highway, but Goddard, L.J., inclined to regard negligence as irrelevant. As, however, it was held that, on the facts, there was no negligence, the decision is not of much assistance on this point.

In *Searle v. Wallbank* (g), the House of Lords held that (1)

(b) Singleton, J., said that he agreed with both his brethren and with the County Court Judge, but other passages of his judgment favour the view of Slesser, L.J.

(c) [1942] A. C. 310 (W. Cases, 221).

(d) [1942] A. C., at p. 331.

(e) Viscount Simon, L.C., and Lord Wright left this point entirely open (pp. 316, 321); Lord Russell accepted *Heath's Case* in its entirety (pp. 317—318); Lord Porter merely referred to it.

(f) [1943] K. B. 574.

(g) [1947] A. C. 341.

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there is no general duty on the part of a cattle-owner to construct a fence between his land and the adjacent highway; (2) if there is such a fence, he is under no duty to keep it in repair sufficient to prevent the cattle from straying to the highway. The grounds on which their lordships based their decision were the harshness of imposing on cattle-owners, especially in rural districts, the duties mentioned above; and the difficulty, if such a duty were imposed, of defining its limits; *e.g.*, the height of the fence and the frequency with which the efficiency of the gates and fences should be examined. It must be noted that their lordships did not go the length of holding that, in no circumstance whatever, can the cattle-owner be liable for negligence. Their actual decision referred to fences, and the facts were that the plaintiff, while cycling on the highway during a "black-out" was injured by a collision with the defendant's horse, which had strayed to the highway through a gap in his fence; the evidence shewed no carelessness on the defendant's part, quite apart from the decision that he was under no duty to take care. We venture to suggest that if he had known of the existence of the gap and had deliberately left it open, he might have been liable for the tort of nuisance, for the owner of an animal may be liable for any tort (in addition to torts peculiar to animals) committed through its agency, if the requisites of that tort are satisfied (*h*). With all deference to the House of Lords, we suggest that there is room for legislative amendment of the rules laid down in *Searle v. Wallbank* (*i*). The fact is that motor traffic has raised in an acute form a problem which scarcely troubled our ancestors. They found it easier to dodge a straying cow when they were driving a vehicle like a horse and cart whose speed was unlikely to exceed 15 miles an hour than we do in driving a car at 45 miles an hour. The very essence of use of the highway is a fair balancing of the competing interests of all those who use it; and a reasonable compromise would be to hold that, where land in the country is unfenced from the highway, users of the road must expect animals

(*h*) *Ante*, § 146. See, too, *Pitcher v. Martin*, *ante*, p. 503; but in *Searle v. Wallbank*, [1947] A. C. 341, 361. Lord du Parcq thought that the rule there laid down applied to nuisance as well as to negligence.

(*i*) It is worth noting that the Highway Act, 1864 (27 & 28 Vict. c. 101), s. 25, makes it a criminal offence for the owner of the quadrupeds there specified to let them stray or be about on the highway; but any right of pasturage by the side of the highway is preserved.

mansuetæ naturæ to stray from the adjacent land to the highway, but that, where the land is fenced, the occupier must keep the fence in repair at least to the extent of preventing fairly large animals like horses, kine and sheep from straying; for otherwise the apparent protection of the fence may be nothing but a trap to the user of the highway. The duty need not, however, be extended to smaller animals, like dogs, cats and poultry, whose incursions on the highway are matter of common experience and are fraught with small risk to traffic. §§ 147, 148.

Of course, whatever be the liability in tort for animals, it may be varied by contract between the parties, whether the action brought be for some ordinary tort, or under the cattle-trespass rule, or under the *scienter* rule. In *Smith v. Cook* (j), X, in return for money payment, put Y's horse in X's field where there were some heifers. X knew that there was a bull on some adjoining land, that there was no adequate fence to keep it out and that it often strayed to his own land; but he did not know that it had a mischievous disposition which led it to gore Y's horse. Now had there been no contract between X and Y, this lack of knowledge would have excused X from liability under the *scienter* action; but it was held that as there was a contract which required him to take reasonable care of the horse, he had failed to fulfil it and was liable. Variation of liability by contract.

§ 148. Cattle-trespass.

In early times if cattle trespassed on another man's land, he could (and still can) distrain them damage feasant, or he had a remedy for trespass in the local Courts, for trespass was familiar there long before the writ for it was common in the King's Courts (k). We first hear of this writ in John's reign (1199—1216) and the earliest instance of its application to the incursions of cattle which Dr. Glanville Williams (l) has been able to trace was in 1214 (m); and in his opinion it was at first confined to intentional trespass by the keeper of the cattle by means of his beasts, and did not apply to mere escape of them. It was not until 1353 (n) that this Cattle-trespass.
Historical.

(j) (1875), 1 Q. B. D. 79.

(k) Maitland, Collected Papers (1911), ii, 151, n. 1.

(l) *Op. cit.*, 130.

(m) Curia Regis Rolls, vii, 206. *

(n) 27 Lib. Ass., pl. 56.

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extension took place. Later generations were worried by the idea that the action for escape ought to have been case, not trespass, because the damage was not direct but consequential (o), and they thought that what afterwards became the action upon the case for nuisance would have been more appropriate. Thus we find the maxim *sic utere tuo ut alienum non lædas* (which is often associated with nuisance) used not only as a rational explanation of the cattle-trespass rule (p) but also as a convenient blanket for covering up the supposed distortion of trespass as a remedy for it (q). But there are notable differences between cattle-trespass and nuisance and it is better to keep the two distinct. Moreover, there was no distortion in 1353 if the action of trespass upon the case did not exist then; latter-day research has not traced it earlier than 1367 (*ante*, p. 3).

Distinct from
negligence.

It has long been settled that liability for cattle-trespass is independent of negligence, and it is that which constitutes its strictness (r). And, in spite of some confusion in time past, it is quite distinct from the *scienter* type of liability. In *Lee v. Riley* (s) the defendant's mare strayed through a gap in his fence, which it was his duty to repair, to the plaintiff's land and there quarrelled with and kicked the plaintiff's horse. The defendant was held liable for cattle-trespass. A great deal of argument was expended at the trial on whether the defendant had notice of the ferocious disposition of his mare, but Erle, C.J., pointed out that, however relevant that might have been in a *scienter* action, it was beside the mark in one for cattle-trespass (t). So, too, in *Theyer v. Purnell* (u), the defendant's sheep, infected with scab, trespassed on the plaintiff's land where they were

(o) *E.g.*, Sir Frederick Pollock regarded it as a "stubborn archaism": *Torts*, 397, note (c), but Dr. Williams shows that it is not: *op. cit.*, 133.

(p) Brian, C.J., in *Y. B. Mich. 20 Edw. 4*, ff. 10, 11, pl. 10; Salter, J., and Atkin, L.J., in *Manton v. Brocklebank*, [1923] 1 K. B. 406, 413; [1923] 2 K. B. 212, 230.

(q) Holt, C.J., in *Tenant v. Goldwin* (1704), 2 Ld. Raym. 1089, 1092.

(r) "It has . . . been held, again and again, that there is a duty on a man to keep his cattle in, and if they get on another's land it is a trespass; and that is irrespective of any question of negligence whether great or small": Lord Coleridge, C.J., in *Ellis v. Loftus Iron Co.* (1874), L. R. 10 C. P. 10, 12. So too *Higgins v. Searle* (1909), 100 L. T. 280; *Bradley v. Wallaces, Ltd.*, [1913] 3 K. B. 629; *Gayler & Pope, Ltd. v. Davies & Son, Ltd.*, [1924] 2 K. B. 75.

(s) (1865), 18 C. B. (N.S.) 722.

(t) *Ibid.*, 733—734.

(u) [1918] 2 K. B. 333, especially the judgment of Avory, J.

interned under a government order and put the plaintiff to considerable expense. He was held entitled to recover this in an action for cattle-trespass and it was immaterial whether the defendant knew, or did not know, of the infected condition of the sheep (a).

§§ 148, 149.

§ 149. *Relation of cattle-trespass to rule in Rylands v. Fletcher.*—In the famous judgment in *Rylands v. Fletcher* (b) Blackburn, J., clearly regarded the cattle-trespass rule as a species of the much broader rule that he was laying down. But it is pretty certain that he did not realise all the consequences of this theory or that one of the oldest parts of English law, which had been worked out with a wealth of decisions, was being wrenched out of its setting and thrust into a new doctrine almost every detail of which had still to be settled. There were whole tracts of the cattle-trespass rule which had not, and never could have, anything in common with *Rylands v. Fletcher*. We shall see, for instance, that the former rule does not entail liability for cattle driven without negligence on the highway and escaping therefrom, nor for cattle straying to the highway from neighbouring land. But that is not so with filth, water, stench or the other noxious things mentioned in *Rylands v. Fletcher*; whether they escape from or to the highway or anywhere else, there is liability if damage is done. Then, again, geese are “cattle” for the purpose of the cattle-trespass rule. Can it really be the law that a straying goose is in the same deadly category as a reservoir which burst with a million gallons of water in it; or, to avoid extreme examples, is the mischief the bird is likely to do comparable with that which will ensue from a blocked waste-pipe in a lavatory basin?

Relation to
Rylands v.
Fletcher.

Fortunately, the Courts have never felt themselves wholly committed to Blackburn, J.’s, identification of the two forms of liability. Some may have paid lip-service to it (c), others

(a) *Cooke v. Waring* (1863), 2 H. & C. 332, was distinguished, where sheep similarly diseased, strayed and infected plaintiff’s sheep. He sued for negligence and lost his case on the ground that no *scienter* (i.e., knowledge of the diseased condition) had been proved against the defendant and therefore negligence was negatived. This was a confusion of *scienter* liability with liability for the tort of negligence. With better pleading the plaintiff might have recovered on the ground of negligence, and certainly should have recovered if he had sued for cattle-trespass.

(b) (1866), L. R. 1 Ex. 265, 280 *seq.* *Ante*, § 140.

(c) *E.g.*, *Holgate v. Bleazard*, [1917] 1 K. B. 443.

§§ 149, 150.

have not even given it that compliment (d), but almost all their actual decisions relating to cattle-trespass would have been just the same if they had never heard of *Rylands v. Fletcher*. Our own suggestion, for what it is worth, is that on both scientific and practical grounds the two ought to be kept separate so far as is possible (e).

§ 150. Scope of cattle-trespass rule.

Scope of rule.

(1) What are "cattle"?

(1) *Meaning of "cattle".*—For the purpose of the rule what are "cattle"? The term is coincident with the old word "avers" and includes horses, oxen, sheep, swine, asses, goats, fowls, geese, ducks and probably peacocks and turkeys. Modern opinion might possibly include tame deer (f). But cats and dogs fall outside the category; for their fleeting visits to the land of other people there is no liability for cattle-trespass. No less than six reasons have been given at various times for the immunity of dogs and they may be equally well applied to that of cats. It has been said that a dog is not usually confined, while cattle, in the common sense of the word, are (g); that it is to the general interest of the community that dogs should be kept and allowed a reasonable amount of liberty (h); that *de minimis non curat lex*, for an ordinary dog is less cumbrous than an ox or horse (i); that its transient incursions must be reckoned as mere involuntary accidents (k); that it is impossible to keep it under the same restraint as ordinary cattle (l). There is common sense in all these reasons; there is none in a sixth

(d) Lord Sterndale, M.R., in *Manton v. Brocklebank*, [1923] 2 K. B. 212, 222; and Atkin, L.J. (at p. 230) regarded *Rylands v. Fletcher* as supplying a reason for cattle-trespass liability, not as defining its limits.

(e) Dr. Williams, *op. cit.*, 198—199, notes other differences. Cattle-trespass (i) is actionable *per se*; (ii) requires trespass to land in the first instance; (iii) needs no occupation of land by defendant; (iv) may be legalised by prescription; (v) is not implicated with "dangerous things" or "non-natural" user of land. But the rule in *Rylands v. Fletcher* (i) probably requires special damage; (ii) includes injuries to land, goods, or persons; (iii) requires defendant to be occupier or licensee of land; (iv) cannot be legalised by prescription; (v) is implicated with "dangerous things" and "non-natural" user of land.

(f) There is no actual English decision, but the Irish case, *Brady v. Warren*, [1909] 2 Ir. R. 632, favours the view; Williams, *op. cit.*, 147—148.

(g) Willes, J., in *Cox v. Burbidge* (1863), 13 C. B. (N.S.) 430, 440; Banks, L.J., in *Buckle v. Holmes*, [1926] 2 K. B. 125, 128—129.

(h) Banks, L.J., last note.

(i) Note (g), *supra*.

(k) *Beckwith v. Shordike* (1767), 4 Burr. 2092.

(l) Willes, J., in *Cox v. Burbidge* (1863), 13 C. B. (N.S.) 430, 440—441, and *Read v. Edwards* (1864), 17 C. B. (N.S.) 245, 260—261.

one which is probably the oldest of them all,—that cats and dogs are not larcenable at common law because there is no property in them (*m*), but this piece of pedantry has long been exploded (*n*). There is not much direct authority for the immunity of dogs, although the whole tenor of such cases as there are is in favour of it (*o*); for cats there was none at all until 1926 when the Court of Appeal clinched the matter in *Buckle v. Holmes* (*p*). The defendant's cat strayed from his land to that of the plaintiff and killed fowls and pigeons there. The defendant was held not liable for cattle-trespass. The Court judicially recognised the roaming disposition of cats and equated them to dogs in this respect; and the same reasons were given for exempting their owners from liability under the cattle-trespass rule. It did not help the plaintiff at all, so far as this rule was concerned, that the cat had destroyed his live-stock, for in an action for cattle-trespass no account can be taken of any damage done by the animal unless it can be proved to have been trespassing in the first instance (*q*); and there had been no such trespass here. Nor was the defendant liable under the *scienter* rule, for there was no evidence that the cat had given earlier indications of a vicious disposition. True, it had killed fowls and pigeons, but that was due, not to vice, but to obedience to its ordinary instincts; had it scratched and bitten the plaintiff on his premises, without provocation, and had its owner known of its propensity to do this, he would have been liable, not for

(*m*) Holt, C.J., in *Mason v. Keeling* (1699), 12 Mod. 332, 335. But in *Cox v. Burbidge* (1863), 13 C. B. (N.S.) 430, 440, Willes, J., professed himself unable to understand the reason.

(*n*) Professor J. H. Wigmore thought that up to the nineteenth century dogs were outside the cattle-trespass rule because, unless they were hunting dogs, they were half-savage hang-ons in the human communities, and that, as they belonged to nobody, nobody was responsible for them: *Selected Essays in Anglo-American Legal History*, in, 515. This may have been so in early law, but it will not do for England "up to the nineteenth century". As far back as 1479 Serjeant Townshend was ridiculed by Noyes, J., for alleging that "wild" dogs had chased his client's beasts: *Y. B. Mod. 20 Edw. 4. f. 11, pl. 10*; cf. Williams, *op. cit.*, 137—146.

(*o*) *Brown v. Giles* (1823), 1 C. & P. 118, is a common law case. Other cases more or less in point are *Mitten v. Fensholt* (1824), 10 C. B. 122; *Mason v. Keeling* (1699), 12 Mod. 332, 335 (Holt, C.J.); *Bartholomew v. Sherbrooke* (1767), 4 Burr. 2092 (Wilkes, J., in note to *Sherbrooke v. Fensholt*); *Sherbrooke v. Fensholt* (1884), 51 L. T. 263; *Buckle v. Holmes* (next note).

(*p*) [1926] 2 K. B. 125 (W. Cases, 228). In *Tallents v. Bell* [1934] 2 A. E. R. 474, the C.A. regarded *Buckle v. Holmes* as having settled the rule with respect to dogs, and they held it immaterial that the dogs in *Tallents v. Bell* might have been specially addicted to barking.

(*q*) *Manton v. Brocklebank*, [1923] 2 K. B. 212 (W. Cases, 228).

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cattle-trespass, but under the *scienter* rule. Again, it may be presumed that if he were negligent in letting his cat stray, e.g., if the cat had repeatedly killed the plaintiff's chickens and he had warned the defendant of this and asked him to repair a gap in his (the defendant's) fence through which the cat strayed, then the defendant would have been liable, not for cattle-trespass, but for the tort of negligence or possibly nuisance. So, too, if he had encouraged the cat to stray, he would have been liable for the ordinary tort of trespass (r) and for all the direct damage it did which would certainly have included the killing of the poultry and pigeons: he would have been in exactly the same position as if he had walked on the land himself and killed them with a stick. To put the matter in another way, all that *Buckle v. Holmes* decided was that it is impossible to commit cattle-trespass through a cat because that animal, like a dog, is not in the category of "cattle"; it certainly did not decide that a man cannot be liable for ordinary torts, or under the *scienter* action (s), for the injuries which his cat or dog may inflict.

(2) The thing injured.

(2) *The thing injured*.—We have next to consider the scope of the rule as to the object injured. In *Manton v. Brocklebank* (t) it was held that unless there be trespass to land to begin with, the action is inapplicable to damage done by the animal to chattels or to human beings on the land (u). X owned a field and, with his consent, the plaintiff put his horse there. Later, and also with X's consent, the defendant put his mare in the field, but he did not notify the plaintiff of this. The mare kicked the horse which had to be destroyed. The Court of Appeal held that the defendant was not liable for cattle-trespass, for the mare had not been trespassing. If the plaintiff put his case upon cattle-trespass pure and simple, he could produce no authority to show that the rule included trespass to chattels where there had been no preceding trespass to land. If he sought to reinforce that rule by the rule in *Rylands v. Fletcher*, the Court declined to infer

(r) Shearman, J., in *Buckle v. Holmes* (1925), 41 T. L. R. 147, 148

(s) *Read v. Edwards* (1864), 17 C. B. (N.S.) 245.

(t) [1923] 2 K. B. 212 (W. Cases, 226).

(u) As Dr. Williams points out (*op. cit.*, 152—157), several earlier cases (especially *Williams v. Ladner* (1798), 8 T. R. 72), which might justify the inference that trespass to land is not always an essential of the action, were not cited in *Manton v. Brocklebank*. One of these cases is *Plummer v. Webb* (1619), Noy 98 (*post*, p. 518, note (e)).

that Blackburn, J., in that case had ever gone the length of holding with respect to animals *mansuetæ naturæ*, like horses, that their owners were liable under *Rylands v. Fletcher* for anything more than their trespass to land and the consequences flowing from it. Indeed, absurd results would follow from the opposite view; an owner of an ordinary peaceable dog would be liable if it were lawfully on the highway and had a fight with another dog, or chased and worried a cat there (a). Nor was the defendant liable for *scienter*, for even if his mare were of a vicious disposition he knew nothing of it; nor for negligence, because there was none in the mere lack of notifying the presence of the mare to the plaintiff.

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(3) *Place of trespass*.—Next, as to the place where the trespass is committed. In general, the defendant is liable wherever it occurred, but this is subject to three qualifications.

(3) Place of trespass.

First, he is not liable if the cause of his cattle straying were neglect of a duty on the part of the plaintiff to fence his land, such duty being owed to the defendant (b); indeed the plaintiff may then be liable to the defendant for harm befalling the cattle in consequence of their coming on his land (c).

Secondly, as has already been stated, if cattle stray from land to the adjacent highway, while the owner of the soil of the highway can sue for trespass, in general no one else has an action (d).

Thirdly, if cattle are lawfully on the highway, there is no liability for trespass upon adjacent land in the absence of negligence on the part of their owner. In *Tillett v. Ward* (e), X owned an ox which, while his servants were driving it with due care through a town, entered the shop of Y, an ironmonger, through an open door. It took three-quarters of an hour to get it out and meanwhile it did some damage. X was held not liable to Y, for this was one of the inevitable risks that arise from driving cattle in the streets. What else could

(a) The judgment of Atkin, L.J., should be studied ([1923] 2 K. B., at pp. 228–233).

(b) A duty to some one else, e.g., the landlord of both plaintiff and defendant, will not suffice: *Holgate v. Bleazard*, [1917] 1 K. B. 443.

(c) *Rooth v. Wilson* (1817), 1 B. & Ald. 59. Other illustrative cases are *Ricketts v. East and West India Docks Ry.* (1852), 12 C. B. 160; *Singleton v. Williamson* (1861), 7 H. & N. 410.

(d) *Ante*, p. 506.

(e) (1882), 10 Q. B. D. 17. At an earlier period the law may have been otherwise: *Littleton, J.*, *obiter* in *Y. B. Mich.* 20 Edw. 4, ff. 10–11, pl. 10.

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X do? No one would urge that a cattle-owner must transport them in vehicles, or attach a halter and an attendant to each member of a herd.

The principle of *Tillett v. Ward* applies to town, as well as country, roads; and it is immaterial whether the land to which the cattle stray is fenced or unfenced. It would have made no difference if the ironmonger's shop-door had been shut, instead of open, and the ox had pushed its way through, or if it had gone through a plate-glass window (f). Moreover, the driver is entitled to enter the premises in order to get the beasts out and for that purpose he must be allowed such time as is reasonable in the circumstances. In *Goodwyn v. Cheveley* (g), where cattle were being driven in the dark, some of them strayed to X's land and put the driver in the dilemma of either forsaking the others while he sought to recover the strays or else driving the others to a place of safety and then returning to get the strays. He chose the latter course which was held to be the reasonable one in the circumstances. If, however, there be negligence in driving the animals, the owner is liable; e.g., if a pony attached to a milk-van is left unattended in the street and bolts into a shop (h).

(4) Kind of damage.

(4) *Kind of damage*.—Next as to the kind of damage which is actionable. In this connexion a phrase continually used is "damage natural to the species of the animal" (for which compensation is recoverable) and its converse "damage contrary to the species of the animal" (for which nothing is recoverable). Bearing in mind the three separate heads of liability for animals, we shall find that this phrase has one meaning in (1) ordinary liability in tort and (2) cattle-trespass, and a rather different one in (3) *scienter* liability. In the first two, the idea underlying it is causation. The damage is too remote if it is not natural to the species of the animal. But in the third it signifies something more than that and we can postpone it for consideration under that head. As to (1) and (2), assuming that some ordinary tort has been committed through the agency of an animal or that there has

(f) *Gayler & Pope, Ltd. v. Davies & Son, Ltd.*, [1924] 2 K. B. 75 (W. Cases, 172).

(g) (1859), 28 L. J. Ex. 298.

(h) *Gayler & Pope, Ltd. v. Davies & Son, Ltd.*, [1924] 2 K. B. 75 (W. Cases, 172). Cases also to some extent in point are *Pinn v. Reu* (1916), 32 T. L. R. 451, and *Turner v. Coates*, [1917] 1 K. B. 670, although the actual decisions related to injuries on the highway.

been cattle-trespass, several illustrations on the remoteness or proximity of damage may be given.

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In *Cox v. Burbidge* (i), a horse trespassed and kicked a child and, as horses do not usually kick human beings, the consequence was held to be too remote. So, too, if I negligently let my horse stray on the highway, it is not acting according to its nature if it knocks over your cycle (k). On the other hand, it was held in *Lee v. Riley* (l) that it is not too remote a consequence that a mare trespassing by night in a strange field should kick a strange horse there, and in *Ellis v. Loftus Iron Co.* (m) the Court, following *Lee v. Riley*, apparently held that it is natural for a straying stallion to bite a mare anywhere (n). The tendency of a class of animals to do a particular thing may exist in some circumstances and not in others; e.g., sheep may have a tendency to run in front of vehicles on the highway at some times, but not at others (o).

(5) *Who can sue and be sued?*—The plaintiff must be in possession of the land in question at the time of the trespass. This includes the buyer of unsevered crops and a person who has an exclusive right of pasture (p) and the servant of the occupier of land, who is injured while he is on the land (q). But a commoner cannot sue, although he is not without a remedy for he can bring an action upon the case (r). Nor can a member of the public found any claim to sue for cattle-trespass upon his mere right to use the highway (s). As to the defendant, the possessor of the cattle is the person liable (t). So, of course, is the owner if the circumstances are such as to make him a joint tortfeasor or vicariously responsible; but probably not beyond that (u), for it can hardly be

(5) Parties.

(i) (1863), 13 C. B. (N.S.) 430, 436—437; *Bradley v. Wallaces, Ltd.*, [1913] 3 K. B. 629.

(k) *Jones v. Lee* (1911), 106 L. T. 123, 124—125.

(l) (1865), 18 C. B. (N.S.) 722.

(m) (1874), L. R. 10 C. P. 10.

(n) *Seemle*, it is natural for a straying horse to resist capture: *Halestrap v. Gregory*, [1895] 1 Q. B. 561 (a case of contract).

(o) Pickford, L.J., in *Heath's Garage, Ltd. v. Hodges*, [1916] 2 K. B. 370, 377; cf. Neville, J., *ibid.* 382—383, who regarded domestic animals on the highway as *prima facie* harmless.

(p) *Wellaway v. Courtier*, [1918] 1 K. B. 200.

(q) *Bradley v. Wallaces, Ltd.*, [1913] 3 K. B. 629. This certainly strains the idea of possession considerably. Cf. Williams, *op. cit.*, 175.

(r) *Marys's Case* (1612), 9 Rep. 111.

(s) *Cox v. Burbidge* (1863), 13 C. B. (N.S.) 430, 435—436.

(t) *Dawtry v. Huggins* (1635), Clayton 32.

(u) In spite of Rolle, Abr. 526 (B) 1. Cf. Williams, *op. cit.*, 177.

§§ 150, 151. that an owner who has bailed cattle to a railway company for carriage or to a dairyman for hire can be held liable for the bailee's defaults.

Defences.

§ 151. Defences to action for cattle-trespass.

Subject to some doubts as to the validity of several of them, they may be catalogued as follows (a).

(1) Act of third party.

(1) *Act of third party*.—The older authorities are baffling in their vacillations on the soundness of this defence (b), but at the present day it ought as a matter of bare justice to be accepted (c). Moreover, the analogy of *Rylands v. Fletcher* favours it. Act of a stranger is a defence to liability under the rule there, and the cattle-trespass rule has been affiliated to the rule in *Rylands v. Fletcher*. That is not to say that the exemption would apply where the cattle-owner has been negligent in failing to anticipate, or to guard against, the default of the third person; thus in *Sutcliffe v. Holmes* (d), the cattle would not have reached the plaintiff's land if the third person had observed his duty to fence his own land, which lay between the land of the defendants and the land of plaintiffs; but, as the defendants knew of the defective fencing, and had taken no reasonable steps to guard against it, they were held liable.

(2) Default of plaintiff.

(2) *Default of the plaintiff*.—An obvious example is the plaintiff's failure to fence a haystack which he is licensed to put up on the defendant's land and thereby the defendant's cattle consume the stack (e). And, in general, where A is under a legal duty to make a fence or to keep one in repair, he has no remedy against B whose cattle stray to his land owing to the ruinous state of the fence (f), but he can, of course, drive them out; indeed, far from having any remedy, A is liable for any harm done to B's cattle in consequence of

(a) We do not include here general defences to tortious liability, except where their applicability to cattle-trespass has been questioned. Thus, no doubt has been expressed as to the availability of leave and licence as a defence: *Park v. Jobson & Son*, [1945] 1 A. E. R. 222.

(b) Dr. Williams notes them, *op. cit.*, 181—184.

(c) As it was in the Irish case *M'Gibbon v. M'Curry* (1909), 43 Irish Law Times Rep. 132 (gate left open by stranger).

(d) [1947] 1 K. B. 147.

(e) *Plummer v. Webb* (1619), Noy 98; the case establishes this point, although on another point it seems inconsistent with *Manton v. Brocklebank*. [1923] 2 K. B. 212 (*antc.*, p. 514, note (u)). For the scope of the duty to fence, see Williams, *op. cit.*, Chap. XIII.

(f) *Singleton v. Williamson* (1861), 7 H. & N. 410.

their straying, e.g., by falling through the defective fence into A's field (g). Nor can A complain if his own cattle stray through the gaps and are killed (h). If A and B are possessed of adjoining closes, whether as landlord and tenant or otherwise, and neither of them is under any legal obligation to the other to fence, each must keep his cattle from straying to the land of the other (i); even if the plaintiff were under a duty to fence towards a third party and had neglected that duty, its neglect will not exculpate the defendant. Therefore if A has covenanted with his landlord, C, to keep his fence in repair and fails to do so, and in consequence the cattle of his neighbour B, to whom he owes no duty to fence, stray to A's land, A can sue B for cattle-trespass (k).

As between landlord and tenant, the duty to fence lies upon the landlord only if he has undertaken it; where fences pass under the lease to the tenant it is (unless there is any agreement to the contrary) the tenant's duty to repair them (l). Further details as to the incidence of the duty to fence must be sought elsewhere (m).

(3) *Act of God*.—There is no direct authority on this, but if cattle-trespass is a particular example of liability under *Rylands v. Fletcher*, then presumably it is a defence; nor is it possible to think of any argument why in common sense it should not be. (3) Act of God.

(4) *Inevitable accident*.—It is impossible to say whether this is a defence at the present day. The older authorities are in conflict and the only modern one is *Ellis v. Loftus Iron Co.* (n), where the defendants' horse reached over a fence separating the land of the plaintiff from that of the defendants and kicked and bit the plaintiff's mare, and the defendants were held liable apart from any question of negligence (o). But two of the Judges (p) showed some hesitation in reaching this conclusion, and it is an open point whether this decision must be regarded as unaffected by the later one in *Stanley v.* (4) Inevitable accident.

(g) *Rooth v. Wilson* (1817), 1 B. & Ald. 59.

(h) *Ricketts v. East and West India Docks, etc., Ry.* (1852), 12 C. B. 160.

(i) *Churchill v. Evans* (1809), 1 Taunt. 509; Woodfall, Landlord and Tenant (24th ed. 1939), 744.

(k) *Holgate v. Bleazard*, [1917] 1 K. B. 443.

(l) Lord Kenyon, C.J., in *Chectham v. Hampson* (1791), 4 T. R. 318, 319.

(m) Hunt, Boundaries and Fences (6th ed. 1912).

(n) (1874), L. R. 10 C. P. 10.

(o) So, too, Avory, J., obiter in *Holgate v. Bleazard*, [1917] 1 K. B. 443, 449.

(p) Brett and Denman, JJ., in L. R. 10 C. P. 10.

§§ 151, 152. *Powell* (q), which is now generally regarded as the established inevitable accident as a defence to trespass by a company of persons. A and B were in a shooting-party, and in firing a pheasant pellets from A's gun glanced off a bough and destroyed B's eye. Any negligence on A's part and destroyed B's eye. Several of the pellets from A's gun had been deflected, not into the eye of B, but into that of A's horse which, terrified thereby, had run into a neighbouring cornfield, ought he to have been liable for trespass to the field and yet not for trespass to B's person? (r).

(5) *Distraint.* (5) *Where the cattle are already distrained damage feasant.*—If A has distrained the cattle of B damage feasant, he cannot sue B for cattle-trespass for the same damage (s), except where they escape from A without his fault (t); for while the distrainment is in operation he is holding the cattle as a pledge, and that is a sufficient reason in the eye of the law to prevent him from bringing an action as well.

(6) *Amends.* (6) *Tender of amends.*—A statute of 1623 (u) makes tender of sufficient amends before the action for trespass is brought a defence to involuntary trespass.

Scienter

§ 152. Liability under the scienter action.

Liability under this rule may be thus stated. Mischievous animals must be kept secure by their controller from doing damage, whether or not the controller be negligent, provided he knows or the law presumes that he knows of their mischievous disposition.

History.

The action from which this rule is deducible is an old one. Dr. Williams has traced the writ as far back as 1387 as an action upon the case (v). English law is not the only system

(q) [1891] 1 Q. B. 86 (W. Cases, 8).

(r) It may be urged that this would create the anomaly of holding that both defences of act of God and inevitable accident are applicable to cattle-trespass, and that there is no other tort to which both defences can be pleaded; but the relation of the two is itself so anomalous that this need give no great concern (*ante*, pp. 48–49).

(s) *Vaspor v. Edwards* (1702), 12 Mod. 658; accepted in *Boden v. Roscoe*, [1891] 1 Q. B. 608, 612.

(t) *Williams v. Price* (1832), 3 B. & Ad. 695.

(u) 21 Jac. 1, c. 16, s. 5.

(v) *Op. cit.*, 278. The writ is in Reg. Brev. (ed. 1687), 110 b. A good deal of learning on its history is to be found in the arguments in *May v. Burdett* (1846), 9 Q. B. 601, and in *Card v. Case* (1848), 5 C. B. 622.

which has been compelled to deal with this topic early in its career, for the savage animal is peculiar to neither time nor elime. It is known to the law of all ages and countries, whether it be the ox prone to gore in Mosaic law, or the wild bear of Justinian's *Institutes* or the fierce dog of King Alfred's laws. It passed into the company of escaping fumes, filth, water and cattle in the judgment delivered by Blackburn, J., in *Rylands v. Fletcher* (a), and that brings us to the question of its relation to the rule laid down in that case. Has the rule in *Rylands v. Fletcher* absorbed the *scienter* rule? If so, there would be little need for independent discussion of the latter. Judges have differed on the point (b) and so have writers (c). If we are guided by the reports as a whole, it is obvious that there is no complete identification. Case after case shows that in several matters of detail there is not, and probably never can be, entire similarity any more than there can be between the cattle-trespass rule and that in *Rylands v. Fletcher*. In fact the very word "*scienter*" marks at least one sharp difference. It mattered nothing in *Rylands v. Fletcher* whether the defendant knew or did not know of the existence of the peril; but no one can be liable under the *scienter* rule without knowledge, express or imputed, of the vice of the animal. Again, there need be no "escape" of the animal for the purposes of the *scienter* rule (d).

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§ 153. At the outset of an exposition of the *scienter* rule, a distinction must be taken between animals *mansuetæ naturæ* and animals *feræ naturæ*.

Animals
mansuetæ
naturæ
and *feræ*
naturæ.

The former class includes domesticated animals like dogs, cows, horses, which are not naturally dangerous to mankind. They are not obnoxious to the *scienter* rule unless and until they develop mischievous propensities of which their owner is aware. Animals *feræ naturæ* are those which are of an

(a) (1866), L. R. 1 Ex. 265, 281; (1868), L. R. 3 H. L. 330.

(b) Yes, according to Bowen, L.J., in *Filburn v. People's Palace Co., Ltd.* (1890), 25 Q. B. D. 258, 261, and Scrutton, L.J., in *Glanville v. Sutton*, [1928] 1 K. B. 571, 577; and authorities referred to in next note. No, according to Lord Dunedin in *Fardon v. Harcourt-Rivington* (1932), 146 L. T. 391, 392, and Viscount Simon, in *Read v. Lyons & Co., Ltd.*, [1947] A. C. 156, 167 (so, too, du Parcq, L.J., in the Court of Appeal, [1945] K. B. 216, 248).

(c) No, according to Williams, *op. cit.*, 352; so, too, the late Sir John Salmond, *Torts* (6th ed.), 493, 494, but his learned editor takes the opposite view (10th ed.), § 147 (4), and he cites in support of it in 3 Cambridge Law Journal, 384, and note 2, some twelve cases.

(d) *May v. Burdett* (1846), 9 Q. B. 101 (W. Cases, 231).

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obviously dangerous or mischievous disposition, such as monkeys, elephants, bears, tigers, gorillas. If they do damage, their keeper is liable without the necessity of proving the savagery of the animal, much less that the keeper was aware of it; nor is it any defence that particular individuals of that class of animals are more or less tamed, or even that this particular animal is in that category (e). The chief importance of the distinction is, first, in the establishment of *scienter*, i.e., of the knowledge of the controller of the animal that its disposition is mischievous, and of this we shall speak in detail later; and, secondly, in the use of the phrase "harm natural to the species of the animal". We have discussed this phrase in connexion with the other heads of liability for animals (f). We have now to observe the difference of meaning attached to it in the *scienter* rule. The decisions are not altogether harmonious but upon the whole we may infer that here the phrase refers not so much to remoteness or proximity of consequence as to one of the primary conditions of liability. The two essentials of *scienter* liability are (1) vice or ferocity of some sort, and (2) knowledge, actual or imputed, of that vice or ferocity. Now as to (1) the law differs with respect to animals *mansuetæ naturæ* and animals *feræ naturæ*.

Harm
natural
to species:
(i) Animals
mansuetæ
naturæ.

As to animals *mansuetæ naturæ* there is no liability unless the vice or ferocity displayed by the animal is contrary to the nature of the species to which it belongs (g). No one will ever succeed in a *scienter* action because cocks crow, pigs smell, dogs chase cats or cats stalk birds, for such behaviour is exactly in accordance with the nature of these animals. He may possibly succeed under some other head of the law of tort, e.g., if he can prove nuisance or negligence, but we are not concerned with that here. But if he can prove that my particular dog is savage to human beings, this is contrary to the nature of dogs in general, and provided my knowledge of its disposition be also established, I am liable (h). What exactly is the nature of any species of animal is a question of law which can be ascertained or predicted only from the reports. Judges do not, of course, ignore matters of common knowledge on this point; e.g., that it is the nature

(e) See *Bankes, L.J.*, in *Buckle v. Holmes*, [1926] 2 K. B. 125, 128.

(f) *Ante*, pp. 516—517.

(g) Dr. Williams takes a different view of the authorities: *op. cit.*, 318.

(h) *Erle, C.J.*, in *Coz v. Burbidge* (1863), 13 C. B. (N.S.) 430, 436—437.

of an ass to eat thistles and that it is not the nature of a horse or a bullock to attack a human being (i); but they have shown a decided objection to the wholesale adoption of what may be called popular natural history. Counsel have often made ingenious and generally unsuccessful attempts to rely upon broad generalisations made by the man in the street about the habits of animals. Thus the popular impression is that all dogs chase game, that all rams butt, that all bulls run at red rags, and counsel for the defence have urged that these are facts which the Judges should take for granted and that, as the dog, ram or bull in the particular case before the Court had only acted according to its nature, it was not mischievous, and therefore its owner was not liable. On the other hand, counsel for the plaintiff have used exactly the same reasoning for the purpose of releasing them from the necessity of proving *scienter*, the argument being that when everybody knows as a fact that animals as a class do this, that or the other, there is no need to prove that this particular defendant knew it. Several decisions illustrate the reluctance of the Courts to accept any such general propositions.

In *Read v. Edwards* (k), A's dog had chased and destroyed some young pheasants of B and A was held liable in a *scienter* action. The Court had no doubt that dogs do chase birds and that so far they act according to their nature, but in this case it was proved that A's dog was of a "peculiarly mischievous disposition" in this respect.

In *Hudson v. Roberts* (l) X's bull, irritated by a red handkerchief which Y was wearing, ran at and injured Y. X was held liable. There was evidence that the bull had shown its antipathy to red by chasing on previous occasions persons who had worn it. All that the case shows is that this particular bull was fierce when it saw red; not that all bulls become fierce when they see red and are therefore acting according to the nature of bulls in charging it.

In *Jackson v. Smithson* (m), S's ram encountered Catherine Ann Jackson and "did then attack, butt and gore the said Catherine Ann, and cast and throw her down to and upon the ground, divers, to wit, five times, and thereby the said Catherine Ann then greatly hurt and injured". S was

(i) Last note, and *Lathall v. Joyce* (1939), 55 T. L. R. 994.

(k) (1864), 17 C. B. (N.S.) 245.

(l) (1851), 6 Ex. 697.

(m) (1846), 15 M. & W. 563.

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held liable; Alderson, B., expressly regarded the ram as breaking through the tameness of its nature, *i.e.*, he declined to accept the popular idea that all rams butt and so behave according to their nature (*n*).

In *Manton v. Bröcklebank* (*o*), the County Court Judge and the Divisional Court had held that it is natural if a mare is turned out to grass among strange horses that they will kick and bite each other in play as well as in quarrel and that this was a matter of law and required no proof by the plaintiff of knowledge on the part of the defendant who owned the mare which had done the harm. But the Court of Appeal, in reversing their decision, declined to accept this and, as there was no other evidence of knowledge of the animal's propensity, they held that there was no liability on that ground.

(ii) Animals
feræ naturæ.

As to animals *feræ naturæ* the rule is exactly the opposite to that with respect to those *mansuetæ naturæ*. Animals *mansuetæ naturæ* do not entail liability unless they are acting contrary to the nature of the species to which they belong, whereas it is precisely because animals *feræ naturæ* are acting according to their nature that their owners are liable. This is plain enough, but what has not yet been explored is the extent to which they are liable, and this will be considered under "scope of the action" (*p*).

Distinction
a question
of law.

It is a question of law whether an animal belongs to the class *feræ naturæ* or not. Animals which have actually been held to fall within it are monkeys (*q*), elephants (*r*), bears (*s*), zebras (*t*). It is not certain what tests the Courts would adopt for determining whether other animals are

(*n*) Erle, C.J., in *Cox v. Burbidge* (1863), 13 C. B. (N.S.) 430, 437—438, in commenting on *Jackson v. Smithson*, said that rams are known to be mischievous at certain seasons. The context seems to show that what the learned Judge meant was that an animal is not acting against the nature of its species if that species has a seasonal proneness to mischief. *Barnes v. Lucille, Ltd.* (1907), 96 L. T. 680, 681, shows that if a particular member of the species has a seasonal ferocity not shared by the species in general, then it is acting against the nature of the species (bitch fierce when it had pups).

(*o*) [1923] 2 K. B. 212 (W. Cases, 228).

(*p*) *Post*, § 155.

(*q*) *May v. Burdett* (1846), 9 Q. B. 101 (W. Cases, 231).

(*r*) *Filburn v. People's Palace Co., Ltd.* (1890), 25 Q. B. D. 258. Even in India this is so: *Vendapuratti v. Koppan Nair* (1911), 1 L. R. 35 Mad. 708.

(*s*) *Besozzi v. Harris* (1858), 1 F. & F. 92.

(*t*) *Marlor v. Ball* (1900), 16 T. L. R. 239. But not a camel: *McQuaker v. Goddard*, [1940] 1 K. B. 687.

included. There are some expressions in the reports (u) which have led some writers to infer that it is "danger to mankind" (a). That probably means that the species of animal is prone to attack human beings, but there is no reason for thinking that the Courts ever intended to lay down a rule that no animal can be *feræ naturæ* unless its mischievous disposition be displayed towards persons, as distinct from property. So far all the cases on animals *feræ naturæ* have been those in which persons were injured. But presumably if property had been injured the result would have been the same. In *May v. Burdett* (b), which is the leading case on the topic, the defendant's monkey bit the plaintiff and the defendant was held liable. But would it have made any difference if, instead of doing that, the monkey had torn the plaintiff's hat? Or suppose that you keep a tiger which escapes and mauls a shepherd and kills his sheep, surely you are just as much liable for the killing of the sheep as for the injury to the shepherd. Moreover, it is possible to think of things which would probably be reckoned *feræ naturæ* although the only injury they can do is to property and not to persons, e.g., locusts.

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It may well be that each case must be dealt with on its merits and that no infallible test for determining whether an animal is *feræ naturæ* can be framed. Little help can be derived from cases concerning the qualified property which it is possible to have in animals *feræ naturæ*, for they relate to ownership of them, not to liability in tort for their misdeeds. Putting these aside, we may suggest very tentatively that in general an animal would be reckoned *feræ naturæ* if (1) it is of a species not indigenous to this country, or, if indigenous, is not ordinarily kept in confinement; and (2) individuals of the species are likely to do considerable mischief if they get out of control. Thus a tiger satisfies both these requisites; a love-bird may satisfy the first but scarcely the second, and this might be why a camel is not

Suggested test.

(u) Lindley, L.J., in *Filburn v. People's Palace Co., Ltd.* (1890), 25 Q. B. D. 258, 261. *Semble*, Bankes, L.J., in *Buckle v. Halmes*, [1926] 2 K. B. 125, 128.

(a) Salmond, Torts, § 146 (2), and note (f), where the learned editor seems to overlook the common meaning of "mankind", for he makes it include property owned by human beings.

(b) (1846), 9 Q. B. 101 (W. Cases, 231).

§§ 153, 154. *feræ naturæ* (c). Bees, according to an Irish decision, are not *feræ naturæ*, although mischief done by them when they are kept in unreasonable quantities and in an unreasonable place may be nuisance or negligence (d). Whether deer are *feræ naturæ* is questionable but perhaps they may be regarded as indigenous and *mansuetæ* rather than *feræ naturæ*. So long ago as 1737, Willes, L.C.J., said that with the progress of time "now they are as much a sort of husbandry as horses, cows, sheep or any other cattle" (e). A wild rabbit kept as a pet, or a performing flea, would probably not be reckoned as *feræ naturæ*. It is true that neither of these animals is ordinarily kept in confinement, but the mischief that they are likely to do if they get out of control is inconsiderable. On the other hand, a fox kept in confinement is likely to do a good deal of harm if it escapes and on the principle suggested ought to be classified as *feræ naturæ*. In any event, it must be remembered that there can be no liability under the *scienter* rule unless ownership or at least control of the individual animal in question has been assumed by the defendant. And it must also be borne in mind that even if the *scienter* rule be inapplicable, one who keeps any animal, whatever its class may be, may possibly be amenable to an action for some other specified tort or, if it come under the category "cattle", to an action for cattle-trespass (f).

§ 154. Proof of scienter.

Proof of
scienter.

The owner of the animal cannot be liable unless he knows of its mischievous disposition. With animals *feræ naturæ* there is an irrebuttable presumption of such knowledge. "People must not be wiser than the experience of mankind. If from the experience of mankind a particular class of animals is dangerous, though individuals may be tamed, a person who keeps one of the class takes the risk of any damage it may do" (g). But with an animal *mansuetæ naturæ* it must

(c) *McQuaker v. Goddard*, [1940] 1 K. B. 687. (Cf. criticism of this case in 56 L. Q. R. (1940), 354—360.) So too, perhaps, a parrot.

(d) *O'Gorman v. O'Gorman*, [1903] 2 Ir. R. 573, 581. Cases like *Kearry v. Pattinson*, [1939] 1 K. B. 471, on the nature of bees, for the purpose of acquiring ownership in them, are not relevant here.

(e) *Davies v. Powell*, Willes 46, 51. But cases like this and *Brady v. Warren*, [1900] 2 Ir. R. 632, are not much in point because they were concerned with other aspects of the law.

(f) Cf. American Restatement of Torts, §§ 506 *et seq.*

(g) Bowen, L.J., in *Filburn v. People's Palace Co., Ltd.* (1890), 25 Q. B. D. 258, 261.

be proved that the owner knew of its tendency to do that particular kind of mischief. Thus, if his horse has bitten another person, it is useless for the injured party to prove that the owner knew that it had a propensity to bite horses; for with animals whose nature is usually mild there is no ground for inferring that if one of them is dangerous in one respect it is therefore dangerous in another (*h*). There is no need to prove that the animal has actually done harm on a previous occasion; it is enough that it has manifested a tendency to do that kind of harm; *e.g.*, that a dog has habitually rushed out of its kennel to the length of its chain in order to bark at and try to bite passing strangers (*i*).

The owner of the animal may be affected with knowledge of its vice even through the agency of another person. If he appoints a servant to keep the animal the servant's knowledge will be imputed to him (*k*), and although notice given by third parties to *any* servant of the owner will not suffice to fix the owner with responsibility, yet notice given to a servant or other person who is entrusted (though only occasionally) with the conduct of the owner's business is, although not conclusive evidence of the owner's knowledge, at least a matter which ought to be left to the jury to enable them to infer whether or not knowledge is to be imputed to the owner. Thus, while the mere fact that a gardener or cook has heard that the mistress's lap-dog is given to bite is not deemed to be knowledge on the part of the mistress (*l*), yet in *Applebee v. Percy* (*m*) where complaints had been made to two barmen that the dog of the publican who employed them was savage, it was held in an action against the publican that there was evidence of *scienter* for the jury; for, although neither of these barmen had the general management of his business nor the care of the dog, yet they were in the position of managers of that part of it, and the notice had been given to them with the intent that it should be communicated to the publican. And in similar circumstances evidence of

Knowledge
of agents.

(*h*) *Glanville v. Sutton*, [1928] 1 K. B. 571.

(*i*) *Worth v. Gilling* (1866), L. R. 2 C. P. 1; *Barnes v. Lucille, Ltd.* (1907), 96 L. T. 680.

(*k*) *Baldwin v. Casella* (1872), L. R. 7 Ex. 325.

(*l*) *Crompton, J.*, in *Stiles v. Cardiff Steam Navigation Co.* (1864), 33 L. J. Q. B. 310, 312; cited by Lord Coleridge, C.J., in *Applebee v. Percy* (1874), L. R. 7 C. P. 647, 657.

(*m*) Last note.

§§ 154, 155. notice given to the wife of a milkman who occasionally helped him with his business was allowed to go to the jury to show that her knowledge was his knowledge (*n*). Where, however, the dog belongs to the servant and the employer's sole connexion with it is that he permits the servant to keep it on the premises, knowledge of the servant cannot be imputed to the employer (*o*).

Dogs.

At one time every dog was "allowed to have one worry" in the sense that, unless and until it had worried sheep or other cattle on at least one previous occasion, *scienter* could not be imputed to the owner as to its vice in that respect. But this rough-and-ready rule put such a heavy burden of proof upon the plaintiff that it was largely abolished by legislation now embodied in the Dogs Act, 1906 (*p*), which makes the owner of a dog liable in damages for any injury done by it to cattle (defined as "horses, mules, asses, sheep, goats and swine") or poultry (*q*), without necessity for showing either a previous mischievous propensity of the dog or the owner's knowledge of it, or that the injury was due to the owner's neglect (*r*). Where such an injury has been done, the occupier of the premises where the dog is kept or permitted to live or remain at the time of the injury shall be liable unless he proves that he was not the owner of the dog at that time. If there are more occupiers than one in any premises let in separate apartments or otherwise, the occupier of that particular part of the premises in which the dog was kept or permitted to live or remain at the time of the injury shall be presumed to be the owner of the dog. It has been held that if dogs acting in concert worry cattle, the owner of each dog is liable for the whole damage (*s*).

Scope of
scienter
action.
(1) Place.

§ 155. Scope of the *scienter* action.

(1) As to place, it is immaterial where the injury was done. It may be on the owner's premises, or on those of the injured

(*n*) *Gladman v. Johnson* (1867), 36 L. J. C. P. 153.

(*o*) *Knott v. L. C. C.*, [1934] 1 K. B. 126. Other relevant decisions are noted in 2 Eng. & Emp. Dig., pp. 245–247.

(*p*) 6 Edw. 7, c. 32, s. 1.

(*q*) Added by Dogs (Amendment) Act, 1928 (18 & 19 Geo. 5, c. 21), s. 1. It was held in *Tallents v. Bell*, [1944] 2 A. E. R. 174, that "cattle", under the Act of 1906, do not include rabbits kept for commercial purposes.

(*r*) This probably does not exclude every defence at Common Law: *Collins, J.*, in *Grange v. Silcock* (1897), 77 L. T. 340, 341, a decision on similar words in an older Act.

(*s*) *Arneil v. Paterson*, [1931] A. C. 560.

party, or in the street or probably in a vehicle in the street in which the animal is confined (*t*).

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(2) As to the kind of mischief done, in spite of some *dicta* to the contrary (*u*), the mere keeping of a mischievous animal is not unlawful (*a*), for if the rule were otherwise, the proprietors of the Zoological Gardens would live in a perpetual state of law-breaking. The only exceptions to this appear to be destructive insects and the musk rat, the keeping of which may be prohibited by governmental order, owing to the great destruction likely to ensue from their escape (*b*).

(2) Kind of mischief.

(3) Provided injury be inflicted by the animal the only limit upon liability is that the damage must not be too remote. With respect to animals *feræ naturæ* the extent of this has yet to be investigated by the Courts. Some rather sweeping *dicta* in *Filburn v. People's Palace Co., Ltd.* (*c*), might countenance the view that it can never be too remote, but the actual decision was simply that the defendants were held liable for injuries inflicted upon the plaintiff by an elephant which they were exhibiting publicly and which ran at him; and it would be a harsh rule which put such limitless liability on the owner. Suppose that an elephant under proper control is being driven through a town as part of a circus and that the mere spectacle of it frightens a horse which runs away in spite of all reasonable attempts to control it and injures X, is the owner of the elephant liable under the *scienter* rule? Unless we are to assume that the mere bringing of the elephant on the highway is a nuisance (*d*), X ought to be met by the defence of remoteness of consequence (*e*).

(3) Remoteness of damage.

(*t*) *Per* Scrutton and Lawrence, L.J.J., in '*Sycamore v. Ley* (1932), 147 L. T. 342 (dog in a car).

(*u*) *May v. Burdett* (1846), 9 Q. B. 101, 111. Farwell, L.J., in *Baker v. Snell*, [1908] 2 K. B. 825, 833.

(*a*) Lord Wright in *Knott v. L. C. C.*, [1934] 1 K. B. 126, 138—139.

(*b*) Destructive Insects Act, 1877 (40 & 41 Vict. c. 68), s. 2, as amended by the Destructive Insects and Pests Acts, 1907 (7 Edw. 7, c. 4), and 1927 (17 & 18 Geo. 5, c. 32); Destructive Imported Animals Act, 1932 (22 Geo. 5, c. 12), s. 6.

(*c*) (1890), 25 Q. B. D. 258; 59 L. J. Q. B. 471; 38 W. R. 706, *per* Lord Esher, M.R., and Bowen, L.J. The facts in the text above are taken eclectically from the various reports, in each of which the statements are inadequate.

(*d*) Cf. *Harris v. Mobbs* (1878), 3 Ex. D. 268 (van and steam-plough left on side of highway).

(*e*) An Indiana appeal is to the like effect: *Bostock-Ferari Amusement Co. v. Brooksmith* (1895), 34 Ind. App. 566; 107 Am. St. Rep. 260; so, too, *Scribner v. Kelley*, 38 Barb. (N. Y.) 14. The American Restatement of Torts, § 507, illustration *g*, makes liability depend on whether bringing the animal on to the highway creates an unreasonable risk of causing fright to

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As to animals *mansuetæ naturæ*, the cases on remoteness merely illustrate general principles. One will suffice. In *Clinton v. Lyons & Co., Ltd.* (f), the plaintiff, with the assent of the defendants, carried a pet-dog into their tea-shop. A cat which had kittens sprang on the dog and bit it. The plaintiff handed the dog to her husband. The cat then sprang upon her and bit her arm. The defendants were held not liable on several grounds, one of which was remoteness of damage.

(4) Persons liable.

(4) Next, what persons are liable under the *scienter* rule? For convenience' sake we have hitherto referred to the "Owner". More exactly, anyone who harbours the animal, knowing its vicious quality, is responsible for it. Most of the decisions relate to dogs, and the provisions of the Dogs Act, 1906, have already been noticed (*ante*, p. 528). In *North v. Wood* (g), a father allowed his daughter, aged 17 years, who resided with him, to keep in his house a dog which he knew to be fierce. She owned the dog and paid for its food and licence. It attacked and killed the plaintiff's dog (h). The father was held not liable because his daughter was old enough to exercise control over the dog. In *Knott v. L. C. C.* (i), the plaintiff was a charwoman employed as cleaner in a school owned by the defendants. X, the school-keeper, kept on the premises a dog as a pet and not as a watch-dog. He was permitted to do this by the defendants. The dog was fierce to X's knowledge, but not to that of the defendants. It bit the plaintiff. She sued the defendants, who were held not liable because they had neither ownership nor control of the dog, quite apart from the fact that they did not know of its disposition (k).

(5) Duration of liability.

(5) If an animal escapes, what is the duration of its owner's liability? There is no English decision on the point (l), but the following rules are suggested :—

human beings or animals, which is likely to result in harm to them or to third persons.

(f) [1912] 3 K. B. 198.

(g) [1914] 1 K. B. 629.

(h) The Dogs Act, 1906, was inapplicable as "cattle" in it do not include dogs.

(i) [1934] 1 K. B. 126.

(k) Lord Wright was of opinion that both at Common Law and by the Dogs Act, 1906, a dog is naturally so associated with a particular master that responsibility for its acts should depend on ownership or possession and control: *ibid.* 141.

(l) The Irish case, *Brady v. Warren*, [1900] 2 Ir. R. 632, does not help

(i) If the animal is *feræ naturæ* and (1) is indigenous to the district in which it does harm (e.g., a fox kept in captivity), the owner is liable until either it recovers its natural liberty *sine animo revertendi* (m) or some one assumes permanent control of it (n); (2) is not thus indigenous (e.g., a tiger), then until some one assumes permanent control of it. §§ 155, 156.

(ii) If the animal is *mansuetæ naturæ*, but savage (e.g., a fierce dog), the owner is liable until someone assumes permanent control of it, with knowledge of its vicious propensities (o).

§ 156. Defences to the *scienter* action.

One or two of these call for special comment.

(1) The Act of God is probably a defence in spite of an *obiter dictum* of Bramwell, B., in which he said: "I am by no means sure that if a man kept a tiger, and lightning broke its chain and he got loose and did mischief the man who kept him would not be liable" (p). But there appears to be no reason why the keeper of a savage animal, as contrasted with the keepers of other dangerous things, should be singled out as such a malefactor that he must be deprived of a defence which is allowed to them. Defences to *scienter* action. (1) Act of God.

(2) If the harm is due to the act of a stranger, the owner, on principle, ought not to be liable, provided he has done everything he reasonably could be expected to do to prevent third persons from meddling with the animal (q). But *Baker v. Snell* (r) indicates the contrary view. A publican entrusted his dog to the care of his potman. Both of them knew it to be fierce. One morning while the publican's housemaid and barmaids were at breakfast, the potman entered the room with the dog on a chain, remarked that he would bet that the dog would bite nobody in the room, let it off the chain and said, "Go it, Bob". The dog did so and bit the housemaid. She sued the publican and was non-suited (i.e., the case (2) Act of stranger.

much, for the action was not of the *scienter* type, and it was held that the deer were tame.

(m) Cf. *dictum* in *Mitchil v. Alestree* (1676), 1 Vent. 695; and Restatement of Torts, § 508.

(n) This would exclude a finder of the animal who merely secures it to the best of his ability pending restoration of it to the owner.

(o) Cf. Salmond, Torts, § 146 (10).

(p) *Nichols v. Marsland* (1875), L. R. 10 Ex. 255, 260.

(q) Cf. the Scottish case, *Fleeming v. Orr*' (1855), 2 Macq. 14.

(r) [1908] 2 K. B. 825.

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was not allowed even to go to the jury). The Court of Appeal ordered a new trial (i) on the ground that the case ought to have gone to the jury in order to ascertain whether the potman were acting in the course of his employment; on this the Court were unanimous; (ii) also on the ground that it is no defence to the *scienter* action that the injury was caused by the intervening voluntary act of a third party; this was held by a majority of two to one. Possibly the decision is supportable on the first ground (s), but the second is unsatisfactory. It leads to results which are not only inherently unjust but also inconsistent with every other rule of strict liability. Would the Court have held a man liable because a burglar sets the man's savage dog on a policeman; or the proprietor of a menagerie because his enemy set free every wild beast in the show? If not, why not? (t).

(3) Default
of plaintiff.

(3) It is a defence that the injury was due to the default of the plaintiff. What is default is, of course, a question of fact in each case. If a man strokes a zebra which is properly secured, he cannot complain if it kicks him (u), much less if he teased it; but accidental treading on the toes of a savage dog which is allowed to be at large will not disentitle the plaintiff from recovering damages for the consequent bite (a).

Where the harm has occurred on the defendant's premises, the law as to *scienter* has in modern times borrowed some rules from the law as to dangerous structures (b). It will be seen in Chapter XXII that in this branch of the law visitors to premises are classified as (i) invitees, or those on business concerning both the visitor and the occupier: e.g., a postman;

(s) But instead of merely stating that the case should have been left to the jury, Cozens-Hardy, M.R., intimated (at p. 828) that the act was in the course of the potman's employment. But if wantonly setting a savage dog on another person is incidental to a servant's employment, why is a man not liable for his gamekeeper's act in wilfully firing a loaded gun at a peaceable citizen? Another doubt is whether the doctrine of common employment might not have applied in *Baker v. Snell*; see *Knott v. L. C. C.*, [1934] 1 K. B. 126, 137.

(t) See Lord Wright in *Knott v. L. C. C.*, [1934] 1 K. B. 125, 139, and Salmond, Torts, pp. 552—553.

(u) *Marlor v. Ball* (1900), 16 T. L. R. 239; cf. *Wyatt v. Rosherville Gardens Co.* (1886), 2 T. L. R. 282; *Sylvester v. Chapman, Ltd.* (1935), 79 S. J. 777; *Lee v. Walkers* (1940), 162 L. T. 89.

(a) *Smith v. Pelah* (1747), 2 Stra. 1264.

(b) *Lowery v. Walker*, [1911] A. C. 10. Earlier cases show no sign of this because the doctrines as to dangerous structures were developed comparatively late; but the same results were reached by applying general principles: see *Sarch v. Blackburn* (1830), 4 C. & P. 297, and Lord Kenyon, C.J., in *Brock v. Copeland* (1794), 1 Esp. 203.

(ii) bare licensees, or those who come for their own purposes with the occupier's express or implied permission: *e.g.*, a guest; (iii) trespassers. Now the duty of keeping the premises or other structure in a safe condition varies towards these three classes and we need not anticipate what is to be said in Chapter XXII on this point. It is enough to note here that the different kinds of care are applicable to cases in which the danger on the premises is a savage animal.

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In *Lowery v. Walker* (c), X put a horse, which he knew to be savage, in his field which the public habitually crossed as a short cut to a railway station. X knew that they did so, although he had not given them express permission. He gave no warning that the horse was savage and it bit and trampled on Y as he was crossing the field. It was held by the House of Lords that X was liable to Y. Their reason for the decision must be deduced from the judgments of the Court of Appeal whose decision they reversed solely because that Court had regarded Y as a trespasser (d) whereas the House of Lords in effect held that he was a bare licensee. The duty of X towards him was that he must not create a concealed trap on the land without warning him of its existence and the horse was such a "trap"; if Y had been an invitee the case would have been still stronger in his favour, for X's duty to him would have been higher. Had he been a trespasser, he must in general have taken the premises as he found them, but the question is a difficult one and discussion of it must be postponed until we consider the details of the occupier's duty towards trespassers (e).

What constitutes sufficient warning, where warning has to be given, is a question of fact. To tell a visitor on an earlier occasion that there is a fierce dog on the premises will not be an adequate warning if, on the day on which he was bitten by it, the owner of the dog conducted him by it in a way which appeared to the visitor to negate the risk (f); and a conspicuous warning, "Beware of the dog", has been

(c) [1911] A. C. 10.

(d) [1910] 1 K. B. 173.

(e) *Post*, Chap. XXII. It is not clear how far *Mourton v. Poulter*, [1930] 2 K. B. 183, is applicable to such a case.

(f) *Curtis v. Mills* (1833), 5 C. & P. 469.

§ 150. ruled to be an insufficient notice to a bare licensee unable to read (*g*). Where a person enters in pursuance not merely of a legal right, but of a public duty (*e.g.*, a policeman executing a warrant), no amount of warning will exempt the owner if he does not properly secure the animal.

(*g*) *Sarch v. Blackburn* (1830), 4 C. & P. 297.

CHAPTER XXI

DANGEROUS CHATTELS

§ 157. There is no doubt that the law as to liability for dangerous chattels is treated in legal literature and practice as a separate compartment of the law of tort, but it is not easy to explain why it is so or in what respect it is a species of "strict" liability. In theory the law of negligence as a tort might be regarded as adequate to cover it. It is true that the law expects of a man a great deal more care in carrying a pound of dynamite than a pound of butter, or in keeping a bottle of poison than a bottle of lemonade. But that is only another way of saying that what is a reasonable amount of care in one set of circumstances is not so in another set of circumstances, and reasonable care is the sole test of negligence. And, passing to the decided cases of dangerous chattels, we have been unable to trace anything in the reports that is inconsistent with the view that the law of negligence is all that is needful for the purpose.

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Is it a species
of strict
liability?

Even the oft-cited case of *Dixon v. Bell* (1816) (a) is no exception to this. X and Y both lodged in the house of one, Leman, where X kept a loaded gun. X left the house one day and sent his servant, a mulatto girl aged about 13 or 14 years, to Leman to fetch the gun, asking him to draw its priming before he gave it to her. Leman did this, told her of the fact and delivered the gun to her. Shortly afterwards she presented the gun in play at Y's son, aged 8 or 9 years, saying she would shoot him. She drew the trigger, and the gun went off and blinded the child in one eye. In an action on the child's behalf to recover damages against X, it was held that X was liable. Lord Ellenborough, C.J., said X's duty was to render the gun "safe and innoxious" either by discharging it or drawing its contents. X had mistakenly thought that drawing the priming would suffice for this purpose, and by that want of care he had left the gun capable of doing mischief. Bayley, J., said that the gun ought to have been so left as "to be out of all reach of doing harm". This

In theory
negligence
would
account
for it.

(a) 5 M. & S. 198.

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appears to mean that the duty was not higher than that of reasonable care (b). But the impression has undoubtedly prevailed from *Dixon v. Bell* onwards that the duty is higher. Thus in 1909 the Judicial Committee said in *Dominion Natural Gas Co., Ltd. v. Collins* (c): "It has, however, again and again been held that in the case of articles dangerous in themselves, such as loaded firearms, poisons, explosives, and other things *ejusdem generis*, there is a peculiar duty to take precaution imposed upon those who send forth or install such articles when it is necessarily the case that other parties will come within their proximity".

But in
practice
it is strict
liability.

In 1932, in *Donoghue v. Stevenson* (d), two of the noble and learned lords tried to mark out more exactly the peculiarity of this duty. Lord Atkin said (e): "The nature of the thing may very well call for different degrees of care, and the person dealing with it may well contemplate persons as being within the sphere of his duty to take care who would not be sufficiently proximate with less dangerous goods; so that not only the degree of care but the range of persons to whom a duty is owed may be extended". Then he cited the *dictum* of the Judicial Committee quoted above, and added: "This, with respect, exactly sums up the position. The duty may exist independently of contract. Whether it exists or not depends upon the subject-matter involved; but clearly in the class of things enumerated there is a special duty to take precautions. This is the very opposite of creating a special category in which alone the duty exists". So, too, Lord Macmillan (f): "The exceptional case of things dangerous in themselves, or known to be in a dangerous condition, has been regarded as constituting a peculiar category outside the ordinary law both of contract and of tort. . . . I rather regard this type of case as a special instance of negligence where the law exacts a degree of diligence so stringent as to amount practically to a guarantee of safety" (g).

(b) Nor was it, we think, in the most conspicuous of the later cases: *Winterbottom v. Wright* (1842), 10 M. & W. 109; *Longmeid v. Holliday* (1851), 6 Ex. 761; *George v. Skivington* (1869), L. R. 5 Ex. 1; *Heaven v. Pender* (1883), 11 Q. B. D. 503; *Dominion Natural Gas Co., Ltd. v. Collins*, [1909] A. C. 640; *Blacker v. Lake & Elliot, Ltd.* (1912), 106 L. T. 533.

(c) [1909] A. C. 640, 646.

(d) [1932] A. C. 562 (W. Cases, 154).

(e) [1932] A. C., at p. 596.

(f) [1932] A. C. 611-612.

(g) These *dicta* were adopted by Atkinson, J., in *Burfitt v. Kille*, [1939] 2 K. B. 743, 747.

The result seems to be that, while in theory we may rightly regard the law as to dangerous chattels as a heavy underlining of one particular topic in the law of negligence, in practice it is affiliated to strict liability; and we may gather from the foregoing *dicta* that the "strictness" of the duty, as compared with the ordinary duty to take care, consists in (1) the wider range of persons to whom the duty is owed, and (2) the "guarantee of safety"; this does not mean absolute liability, but that the defendant can exonerate himself only by proving that he has taken what Sir Frederick Pollock called "consummate care" towards other persons in his dealings with the chattel.

But what chattels are dangerous? As has been noticed earlier (p. 484) the word is admittedly vague. Both writers and Judges have sharply criticised the inconsistent, indeed contradictory, meanings which have been attached to it (*h*), and the confusion has been increased by the use of the phrases, "dangerous *per se*" and "dangerous *sub modo*, or according to circumstances". But, however much the Judges may censure these expressions or the simpler antinomy "dangerous", "non-dangerous", they still go on using them (*i*) and we have to make the best of them. Any test which can be suggested is wide of the mark if it takes a solitary word like "gun", "car", "lamp", "fire", "water", and professes to put it for all time and in all circumstances in one or other of the categories "dangerous" or "non-dangerous". That leads only to stultification of the test, for the Courts cannot agree whether even an unloaded gun is dangerous in itself (*k*).

Meaning of dangerous.

Dr. Charlesworth has urged that what makes a thing dangerous is the element of surprise in it; *e.g.*, a knife is not a dangerous chattel because its nature is obvious and open, while a chair with a rotten leg is because, a chair being by its nature harmless, the danger is unexpected and

(*h*) See Dr. Stallybrass's admirable and exhaustive study in 3 Cambridge Law Journal (1929), 376—397.

(*i*) *E.g.*, *Wray v. Essex C. C.*, [1936] 3 A. E. R. 97; 155 L. T. 494. In *Glasgow Corporation v. Muir*, [1943] A. C. 448, 463—464, Lord Wright approved the distinction between things dangerous *per se* and dangerous *sub modo*.

(*k*) Parke, B., in *Langridge v. Levy* (1837), 2 M. & W. 519, 530, thought it was not; Fitzgibbon, L.J., in *Sullivan v. Cæd*, [1904] 2 Ir. R. 317, 340, thought it was.

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159.

unforeseen (l). This is certainly helpful although it will not cover all the decided cases, for in *Blacker v. Lake & Elliot, Ltd.* (m), the plaintiff was injured by a latent defect in a brazing lamp, and while Hamilton, J., thought that it was not dangerous *per se*, Lush, J., thought that it was. Dr. Stallybrass suggests that the true distinction is not between the dangerous or non-dangerous character of the thing inherently, but between those circumstances in which the defendant will be allowed to deny the dangerous character of his act and those in which he will not (n). This is unquestionable, although it will not, of course, enable us to predict exactly what circumstances will suffice for the purpose. Be the test what it may, the question whether a chattel is or is not dangerous is one of law for the Judge.

In giving the detailed rules under this head of liability we must touch occasionally upon the law of contract, for in several of the cases it has overlapped the law of tort.

(1) Liability
to visitors.

§ 158. Liability to visitors on defendant's premises.

Where A occupies premises or a structure and B, a visitor to them, is injured by A's dangerous chattel, A's liability to B is only one species of that connected with dangerous structures, which is the subject of Chapter XXII, *post*. *Smith v. Steele* (o) is an example. A pilot coming on board the defendants' ship was killed by the fall of a boat which had been negligently slung, and the defendants were held liable.

(2) Liability
to immediate
transferees.
(i) Under
contract.

§ 159. Liability to immediate transferees of the chattel.

(i) If the transfer is by A to B in pursuance of a contract between them, liability is naturally regulated by the terms of the agreement. In *Ward v. Hobbs* (p), A sold pigs to B "with all faults". They were suffering from typhoid fever, a fact which B discovered only when his own pigs had become infected by the disease. The terms of the sale were held to

(l) Liability for Dangerous Things (1922), 279. Another test of Dr. Charlesworth's (*ibid.* 7) is less felicitous. "To constitute anything a dangerous thing, its power to cause damage must be (i) inherent; (ii) invariable, and (iii) due to human agency"; for, as Dr. Stallybrass asks, "Is there anything which is at all times and in all places and in all circumstances dangerous?" (3 Cambridge Law Journal (1929), 386).

(m) (1912), 106 L. T. 533.

(n) 3 Cambridge Law Journal, 389.

(o) (1875), L. R. 10 Q. B. 125.

(p) (1878), 4 App. Cas. 13.

exclude A's liability. On the other hand, in *Hyman v. Nye* (q), A let to B a carriage and horses for a particular journey. Owing to a defective bolt in the carriage an upset occurred and B was injured. A was held liable because the carriage was not in a reasonably fit and proper condition for the purpose for which it had been hired. A did not know of the defect but it did not appear that he could not have discovered it with reasonable care and skill; and that was so whether B based his claim on breach of contract or on tort. Here, then, the extent of the duty in either branch of the law coincided, but contract may quite possibly impose a stiffer duty than that in tort, as in the implied warranties of quality under the Sale of Goods Act, 1893 (r).

(ii) If the transfer be a gift or a gratuitous loan, the giver or lender is liable only for wilfulness or gross negligence in not revealing a defect of which he knows. In *Coughlin v. Gillison* (s), where this principle was recognised, the borrower of a donkey-engine was injured by its bursting, but as he could not prove either negligence or knowledge on the part of the lender, the latter was not liable. It is proverbial that one must not look a gift horse in the mouth. (ii) Gift or loan.

(iii) Independently of contract, gift or loan, the transferor is perhaps liable in tort to the transferee who is injured by a chattel which, although not dangerous in itself, is potentially dangerous to the knowledge of the transferor who is negligent in not warning the transferee. In *Clarke v. Army & Navy Co-operative Society, Ltd.* (t), the defendants sold to X a tin of disinfectant powder, knowing that it was likely to cause danger to a person opening it, because of its defective lid. They did not inform X of this and she opened the tin in the usual way by prising the lid off with a spoon. A portion of the powder flew out and injured her eyes. The Court of Appeal held the defendants liable irrespective of any warranty that might have existed under the Sale of Goods Act, 1893. (iii) In tort.

So far, none of the headings which we have developed seems to be an example of strict liability. The ordinary law of negligence, where it was a question of tort only, would have covered them all.

(q) (1881), 6 Q. B. D. 685.

(r) 56 & 57 Vict. c. 71, ss. 13—15.

(s) [1899] 1 Q. B. 145. Cf. *MacCarthy v. Young* (1861), 6 H. & N. 329.

(t) [1903] 1 K. B. 155.

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(3) Liability
to ultimate
transferee.

§ 160. Liability to ultimate transferee of chattel or to person ultimately injured by it.

Here A delivers the chattel to B who transfers it to C. It injures C between whom and A there is no contractual relation. Alternatively, C, although not a transferee, is injured by B or some other person using the chattel (*u*). What is A's liability to C? The latter case can be disposed of by reference to *Dixon v. Bell* and *Dominion Natural Gas Co., Ltd. v. Collins* (*ante*, pp. 535—536). As to the former case :—

(i) For fraud.

(i) A is liable to C for fraud. In *Langridge v. Levy* (*a*), the defendant, a gun-maker, sold a gun to the father of the plaintiff for the use of the father and his sons, representing falsely and knowingly that the gun had been made by Nock (a celebrated manufacturer) and was “a good, safe and secure gun”. The father handed the gun to the plaintiff who discharged it. It burst and injured his hand. The defendant was held liable on the ground of tortious deceit (*b*).

(ii) Knowledge.

(ii) A is liable to C for negligence if he knows the chattel to be dangerous in itself and does not give adequate warning of the risk, unless the danger is an obvious one. This has never been questioned. *Anglo-Celtic Shipping Co. v. Elliott* (*c*) illustrates the rule. C owned a ship and sent it to B to clean the condenser. He told B to use a cleaning fluid, “pluperfect liquid”. This was manufactured by A and, if it came in contact with cast iron, it generated an explosive gas. Neither C nor B knew this, but A either knew, or ought to have known, it. An explosion occurred in the use of the liquid on cast iron and Roche, J., held that A was liable to C. Until 1932 it was not certain whether it is sufficient for A to warn B the first recipient of the chattel or whether he must also warn C, the ultimate transferee. Roche, J., held that he must warn C, but he admitted that only the House of Lords could settle the point (*d*). They did so in *Donoghue*

(u) Cf. *Mr. Chapman* in 54 L. Q. R. (1938), 46.

(a) (1837), 2 M. & W. 519; (1838), 4 M. & W. 337.

(b) Brett, M.R., in *Heaven v. Pender* (1883), 11 Q. B. D. 503, 511—512, criticised the case but he accepted it on the ground on which it was decided, although he thought that negligence would have been a better basis.

(c) (1926), 42 T. L. R. 297.

(d) *Farrant v. Barnes* (1862), 11 C. B. (N.S.) 553, accords with this with respect to the special duty owed to a common carrier. Lush, J., in *Blacker v. Lake & Elliot, Ltd.* (1912), 106 L. T. 533, 540, laid down the rule as a general one.

v. *Stevenson* (e) by holding that C must either be warned or at least have a reasonable opportunity of inspecting the chattel. § 160.

(iii) If the chattel is dangerous only owing to special circumstances, A is liable to C for negligence if he knows or ought reasonably to have known of the danger and does not either warn C of it or at least give him the opportunity of discovering it by reasonable inspection. (iii) Danger due to special circumstances.

It was only in 1932 after a century of doubt and vacillation on the part of the Courts that this proposition could be confidently advanced. The full story of the matter would take us back to the beginnings of the action of *assumpsit*, but it has already been traced elsewhere (f) and, on the score of brevity, we do no great violence to its history if we take an argument in *Langridge v. Levy* (1837), in the Court of Exchequer (g) as our starting point. The facts of the case have just been given. Counsel for the plaintiff urged that, quite apart from deceit, the defendant ought to be liable because "the law imposes on all persons who deal in dangerous commodities or instruments, an obligation that they should use reasonable care, much more that they should not supply them knowing them to be likely to cause injury" (h). But the Court declined to assent to a proposition which really anticipated the House of Lords' decision in *Donoghue v. Stevenson* nearly 100 years later and which they regarded as an attempt to persuade them to lay down new law (i). Doubts until 1932.

Five years later, *Winterbottom v. Wright* (1842) (k) came before the same Court. The action was one upon the case against the defendant who had, under a contract, supplied X with a defective mail-coach and the declaration alleged that "Privity of contract" fallacy.

(e) [1932] A. C. 562 (W. Cases, 154). Cf. *Howard v. Furness, etc., Lines, Ltd.*, 55 Ll. L. Rep. 121.

(f) 34 Columbia Law Review (1934), 41—66.

(g) 2 M. & W. 519; the affirmation by the Court of Exch. Ch. was in the briefest terms: 4 M. & W. 337.

(h) 2 M. & W. at p. 525.

(i) "We think this action may be supported without laying down a principle which would lead to that indefinite extent of liability, so strongly put in the course of argument on the part of the defendant; and we should pause before we made a precedent by our decision which would be an authority for an action against the vendors, even of such instruments and articles as are dangerous in themselves, at the suit of any person whomsoever into whose hands they might happen to pass, and who should be injured thereby. We do not feel it necessary to go this length, and our judgment proceeds upon another ground": 2 M. & W. at p. 530.

(k) 10 M. & W. 109.

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the defendant "so improperly and negligently conducted himself, and so utterly disregarded his aforesaid contract" that the plaintiff, the driver of the coach, was injured. It was held that the declaration was bad because the plaintiff's claim was based on a contract to which he was no party; and, in view of that, it is hard to see how the Court in an era in which pleadings were strictly construed could have decided otherwise. But unfortunately some of the expressions used in the judgments (especially that of Lord Abinger, C.B.) were open to the interpretation that even if the plaintiff had sued for negligence, independently of contract, he could not have recovered *because there was no privity of contract between him and the defendant*. This idea infected several later decisions and in at least one of them it appeared as a full-blown fallacy (l) : if A is under a contract with B and A breaks the contract, C, who is injured by its breach, cannot sue A; not in contract because there was none between C and A (this is correct); not in tort because the whole of A's duty was limited to his contract with B. But this does not follow. The true view ought to be that a contract between A and B is entirely irrelevant to the question, "Is A liable in tort to C?" It ought neither to make nor to mar his chances of success in tort. The idea of contract as the perfect circle that must not be spoiled by any indentation or protuberance is intelligible, but it was forgotten that this circle might be intersected by another figure of considerably less symmetry—the law of tort (m).

We need not give a detailed account of the decisions between *Winterbottom v. Wright* and *Donoghue v. Stevenson*.

(l) *Alton v. M. Ry.* (1865), 19 C. B. (N.S.) 213; it has long ceased to be of authority: Winfield, *Province of Tort*, 74—75.

(m) The dicta in *Winterbottom v. Wright*, although regrettable in the light of later development of the law, were nevertheless explicable on historical grounds. In 1842 procedure still dominated our law, and *assumpsit* in its various forms still made it, not so much difficult, as unnecessary to draw the lines between contract, quasi-contract and tort, except as an incident to some procedural point in litigation. Negligence as a tort was a mere strippling concealed behind the action upon the case for negligence and its existence was only half consciously perceived or easily forgotten. Many of the old cases on negligence (in its other sense of a careless manner of doing a thing) were cases in which the defendant had "undertaken" (*assumpsit*) to do something for somebody, and "undertaking" was a conveniently ambiguous word which might cover liability in delict, contract, quasi-contract or bailment. Where the undertaking was what we should now call contractual it was not difficult to say then that the undertaking did not extend to some third party who happened to have been injured by its breach.

Some of them look like an uncritical adoption of the weakest part of Lord Abinger's judgment in *Winterbottom v. Wright* (n), but even from them indirectly and from other cases directly (o) the principle can be extracted that if the defendant actually knew of the latent defect in the chattel and did not warn the ultimate transferee, he was liable. But, except in one solitary case, the Courts declined to hold the defendant liable if, although he did not actually know of the defect, he might nevertheless have discovered it with reasonable care (p). The exception was *George v. Skivington* (q). There, the defendant compounded and sold to X a mischievous hair-wash which X's wife used and thereby was injured. The defendant did not know of the harmful quality of the hair-wash but he did know that X's wife was the person destined to use it. He had been careless in its manufacture and the Court of Exchequer held that he was liable. But the decision was regarded in many quarters as inconsistent with *Winterbottom v. Wright* and with the trend of authority after that case. Meanwhile in the latter half of the nineteenth century the idea of negligence as a tort came to be clearly grasped, its sphere was steadily enlarged and the confusion of its historical connexion with contract was beginning to disperse.

This reacted in favour of the view taken in *George v. Skivington* and in 1883, Brett, M.R., made a gallant but unsuccessful attempt in *Heaven v. Pender* (r) to give it fuller effect. A dock owner supplied to a ship owner a staging for use in painting his ship. The staging was defective owing to the dock owner's negligence, and a painter, who had contracted with the ship owner to paint the ship, was injured in consequence. The Court of Appeal held that he could recover damages from the dock owner. Their ground for doing so was an application of the rule in *Indermaur v. Dames* (s) which we shall consider elsewhere (post, § 164) and which requires the occupier of premises to have them in a reasonably fit and

(n) E.g., *Earl v. Lubbock*, [1905] 1 K. B. 253; if properly pleaded, this case would probably be differently decided to-day: [1941] 2 K. B. at p. 379.

(o) E.g., *Longmeid v. Holliday* (1851), 6 Ex. 761.

(p) Cases in notes (n) and (o), and *Bates v. Batey & Co., Ltd.*, [1913] 3 K. B. 351.

(q) (1869), L. R. 5 Ex. 1.

(r) 11 Q. B. D. 503.

(s) (1866), L. R. 1 C. P. 274, 288.

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safe condition for persons who come there on business. But Brett, M.R., was willing to go farther and to decide the case on the broad ground of negligence. He put forward a principle differing little in terms from that urged by counsel in *Langridge v. Levy*, but rejected by the Court there. So, here, Brett, M.R., was unable to secure the adherence of his brethren.

In the years succeeding *Heaven v. Pender* English lawyers were prompted by Sir Frederick Pollock (t) to look across the Atlantic where the current of authority set the other way (u), although, of course, it could have no more than persuasive effect here.

Donoghue v. Stevenson
(1932) settles
the rule.

At last matters came to an issue in *Donoghue v. Stevenson*, [1932] A. C. 562 (v), a Scottish appeal to the House of Lords. There was a pitched battle between those who supported something that was very like an outworn fallacy and those who would sweep it aside as an obstruction to the development of the law of negligence as a tort; and by a majority of three to two, the victory was with the latter. The facts alleged were that X, a ginger-beer manufacturer, sold to a retailer a bottle of ginger-beer in which, unknown to any one, were the decomposed remains of a dead snail; that Y bought the ginger-beer from the retailer and poured out some of the contents of the bottle into a tumbler for a lady friend, Z, who drank them; that the bottle being of opaque glass, nothing of the snail was discernible until Y was replenishing Z's tumbler, when its remains floated out; and that in consequence partly of what she had swallowed and partly of what she saw, Z became very ill. She sued the manufacturer and it was held that he was liable if Z could prove her allegations and also that X had not taken reasonable care to prevent the injury. Lord Atkin laid down the following rule as representing both Scots and English law: "A manufacturer (a) of products, which he sells in such a form as to show that he intends them

(t) The first edition of his *Torts* was in 1887.

(u) *Thomas v. Winchester* (1852), 6 New York 397. See Professor F. H. Bohlen in 45 *Law Quarterly Review* (1929), 343—369; Professor A. L. Corbin in 46 *Law Quarterly Review* (1930), 12—45. In the American Restatement of the Law of Torts, Negligence (1934), § 395, the manufacturer is put under a duty similar to that in *Donoghue v. Stevenson*, [1932] A. C. 562.

(v) W. Cases, 154.

(a) Circumstances may bring a distributor of goods, a repairer of goods and a supplier of goods within the same rule: *Watson v. Buckley, etc., Ltd.*, [1940] 1 A. E. R. 174; *Herschthal v. Stewart & Arden, Ltd.*, [1940] 1 K. B. 155; *Stennett v. Hancock*, [1939] 2 A. E. R. 578.

to reach the ultimate consumer in the form in which they left him with no reasonable possibility (b) of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care" (c).

The rule, we venture to add, is consonant with the needs of any modern civilised community, for the user of almost any potentially dangerous chattel must of necessity rely blindly on the manufacturer for its safety, and the manufacturer is the one person of all others who has control over the composition of what he sells. Of that the user generally knows nothing and it is cold comfort to tell him that he may have a remedy in contract against the retail vendor, for the vendor is often not worth suing. Nor is any harsh "absolute" liability imposed on the manufacturer; that is negatived both by the terms of the rule and by later decisions, as we shall see shortly.

The rule was followed in *Grant v. Australian Knitting Mills, Ltd.* (d), by the Judicial Committee, where the defendants were held liable to the ultimate purchaser of some pants which they had manufactured and which contained some chemical that gave the plaintiff a skin disease when he wore them. It was argued for the defendants that there was a much greater possibility of intermediate tampering with the goods before they reached the user than there was with the sealed bottle in *Donoghue's Case*, but the Court held that a mere possibility of interference did not affect their liability; if actual tampering had been proved, that would have been another matter.

The manufacturer is not liable unless the defect is proved to have been due to his negligence (e). If the evidence merely shows that the accident may equally well have occurred from some other cause, the plaintiff cannot succeed (f).

(b) Goddard, L.J., in *Paine v. Colne Valley, etc., Co.* (1938), 55 T. L. R. 181, 183—184, preferred "probability".

(c) [1932] A. C. at p. 599.

(d) [1936] A. C. 85. Cf. 52 L. Q. R. (1936), 12—15.

(e) *Res ipsa loquitur* apparently applies: *Grant's Case*, [1936] A. C. at p. 101; *Chaproniere v. Mason* (1905), 21 T. L. R. 633. The *obiter dictum* of Lord Macmillan in *Donoghue's Case*, [1932] A. C. at pp. 622—623, seems to be unsupported: *Daniels v. White*, [1938] 4 A. E. R. 258, 260—261.

(f) *Evans v. Triplex Safety Glass Co., Ltd.*, [1936] 1 A. E. R. 283; *Daniels v. White*, [1938] 4 A. E. R. 258, 260—261.

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Exceptions to
Donoghue's
Case.

The principle in *Donoghue's Case* has been applied in several later decisions (g), but it was obvious from the speeches in the case itself that the Courts were destined to do a good deal of work in marking the bounds of the decision and the *dicta* in it. Thus it has been held that the manufacturer is not liable in the following circumstances.

(i) If the defect in the chattel is discoverable on reasonable inspection by the plaintiff. In *Farr v. Butters Bros. & Co.* (h) the defendants, who were crane manufacturers, sold a crane in parts to the X Co., a firm of builders, and it was arranged that the parts were to be assembled by the X Company's men. They put the job in the hands of their employee, the plaintiff, who was an experienced crane erector. He found defects in some of the parts, marked them with chalk as inaccurate in fitting, and said at the same time that he would have to report the matter to the X Co. Nevertheless he began to work the crane before the defects had been remedied, and in consequence of them a part of the crane fell upon him and killed him. An action was brought on his behalf under the Fatal Accidents Act, 1846, against the defendants. The Court of Appeal held that they were not liable. In fact the Court could scarcely have done otherwise consistently with *Donoghue v. Stevenson*, where the rule formulated by Lord Atkin expressly excludes liability if there is a "reasonable possibility of intermediate examination". Any one who behaved as the deceased man did in *Farr's Case* might be regarded as having shown contributory negligence, but it is particularly worthy of note that the Court of Appeal declined to base their decision on this ground because they thought that the claim failed at an earlier stage; as there had been an opportunity of reasonable inspection, the defendants owed

(g) *E.g.*, *Malfrout v. Nozal* (1935), 51 T. L. R. 551; *Howard v. Furness-Houlder, etc., Ltd.* (1936), 55 Ll. L. Rep. 121; *Read v. Croydon Corporation* (1938), 108 Ll. J. K. B. 72; *Barnes v. Irwell, etc., Board*, [1939] 1 K. B. 21; *Stennett v. Hancock*, [1939] 2 A. E. R. 578; *Buckner v. Ashby and Horner, Ltd.*, [1941] 1 K. B. 321; *Haseldine v. Daw & Son, Ltd.*, [1941] 2 K. B. 343. It should be noted that *Donoghue v. Stevenson* had two distinct aspects: (1) the specific rule stated in the text, *supra*; (2) Lord Atkin's general definition of duty in negligence. The duty in (1) is higher than that in (2), but in cases later than *Donoghue's* it is often difficult to determine whether the decisions were based on (1) or (2).

(h) [1932] 2 K. B. 606 (W. Cases, 234). In *Otto v. Bolton*, [1936] 2 K. B. 46 (W. Cases, 237), Atkinson, J., regarded this exception as applicable to the much more general statement of duty in the law of negligence made by Lord Atkin in *Donoghue v. Stevenson*, [1932] A. C. 562, 580 (*ante*, § 123).

no duty at all to the deceased. It was, therefore, useless to talk about contributory negligence on his part when there had been no negligence on the defendants' part. The practical application of this is that facts like those in *Farr's Case* will not be allowed to go to the jury on the question of contributory negligence (i). It is submitted that the mere existence of an opportunity for inspecting the goods after the defendant has parted with them is not enough to exonerate him. If he did not anticipate, or could not reasonably have anticipated, such inspection, he is liable, irrespective of the existence of any such opportunity (k).

(ii) If the article is not dangerous at the moment when it is put in circulation and becomes so only by the act of the user. In *Pattenden v. Beney* (l), a metal cylinder was handed as refuse by a householder to a dustman. It contained gas but in such small quantity that it was not dangerous when delivered to the dustman. He was killed by its explosion and the jury found that the explosion was due to his handling of it. The householder was held not liable.

(iii) If there has been no lack of reasonable care on the part of the defendant. A lemonade manufacturer who adopts a "fool-proof" process in filling his bottles rebuts any evidence of negligence based upon the fact that a consumer was injured by swallowing carbolic acid which, for some unknown reason, had found its way into the bottle (m).

(iv) If the source of injury to the plaintiff is a ruinous house which the defendant has let or sold to another person and in which the plaintiff happens to be. This we shall consider at length in the next chapter (*post*, p. 554).

(i) [1932] A. C. 617, 620. Cf. *Evans v. Triplex Safety Glass Co., Ltd.*, [1936] 1 A. E. R. 283; *Kubach v. Hollands* (1937), 53 T. L. R. 1024; *Paine v. Colne Valley, etc., Co., Ltd.* (1938), 55 T. L. R. 181.

(k) *Herschthal v. Stewart & Arden, Ltd.*, [1940] 1 K. B. 155, is preferable to *Dransfield v. British, etc., Cables, Ltd.* (1937), 54 T. L. R. 11. Cf. 54 L. Q. R. (1938), 59—69; 56 L. Q. R. (1940), 20—22.

(l) (1934), 50 T. L. R. 10, 204.

(m) *Daniels v. White & Sons, Ltd.*, [1938] 4 A. E. R. 258. Two unreported county court cases are to the like effect: 79 S. J. (1935), 45; 85 Law Journal (1937), 85. For a criticism of *Daniels' Case*, see 55 L. Q. R. 6—9.

CHAPTER XXII

DANGEROUS LAND AND STRUCTURES (a)

§ 161.
Meaning of
structures.

§ 161. The title of this chapter requires a brief explanation. It would be misleading to style the topic "dangerous premises" although that would be a natural antithesis to "dangerous chattels" in the preceding chapter. But in fact it would be too narrow to be exact, for the rules now to be discussed are not limited to immovable property like open land, houses, railway stations and bridges, but have been extended to movables like taxicabs, omnibuses, railway carriages, gangways and scaffolding (b). All these, except land, can be included in the elastic term "structures". As it therefore covers some things which are chattels, it may be asked what the distinction is between chattels in this connexion and in the last chapter. It seems to be this. The defendant, where dangerous structures of a movable kind are concerned, retains control of them, whereas under the "dangerous chattel" type of liability the control and very often the full ownership of the chattel has passed to some one else who is subsequently injured by it. A less solid distinction is that with dangerous movable structures the plaintiff is injured by entry upon them; that is not usually so with dangerous chattels, indeed the chattel is generally so small that "entry" upon it in the common sense of that term is not possible.

The border-line between structures and chattels must occasionally be a faint one. In *Bottomley v. Bannister* (c) a house was fitted with a boiler placed in the kitchen and heated by a gas-burner. The occupants of the house were poisoned by fumes from the apparatus. Was the boiler a chattel or was it part of the realty? The Court of Appeal held it to be part of the realty, but Scrutton, L.J., also dealt with the case on the alternative supposition that it was a chattel.

(a) The American Restatement of the Law of Torts (1934), Chap. 13, should be studied for comparative purposes.

(b) *Francis v. Cockrell* (1870), L. R. 5 Q. B. 501, 504 (W. Cases, 241); *Maclean v. Segar*, [1917] 2 K. B. 325, 333.

(c) [1932] 1 K. B. 458.

The liability for dangerous structures (which, for brevity's sake we shall generally use henceforth to include land) is a species of strict liability (*d*). The reason for this increased stringency is probably that the safety of the structure is much more likely to be within the knowledge and control of the occupier than of the person who comes upon it. Very few people who enter a shop, ship, factory, house or vehicle, or who go upon appliances connected with them, like a lift or gangway, have or can have full knowledge or control of the possible dangers that lurk in them. They must trust themselves mainly to the occupier even when they exercise reasonable care on their own behalf. Modern civilisation has greatly increased the risks they run. Indeed, this accounts, to some extent, for the comparatively recent evolution of the law on this subject, although another equally important factor has been the inroad made by the development of the law of negligence on the older idea that an owner can do what he likes with his land so far as visitors to it are concerned (*e*). Machinery and appliances which are the common-place fittings of modern dwelling-houses, to say nothing of factories and railways, were unknown little more than a century ago. The Common Law has rightly taken account of the increased perils which have resulted from this and has screwed the duty of the occupier to a proportionately higher pitch.

§ 161.

Liability
compared
with
negligence.

In isolating "dangerous land and structures" as a separate rubric in the law of tort, we are following the practice not only of other writers but also of the Courts, but, so far as scientific arrangement of the law goes, the topic presents some curious features. The duties of the occupier of the land or the structure are cast in a descending scale to four different kinds of persons. The highest degree of care is owed by the occupier to one who enters in pursuance of a contract with him; a less degree is due to the "invitee" who (without any contract) enters on business of interest to both himself and the occupier; still less is due to the "licensee" who comes, with the occupier's permission, on business of interest to himself but of none to the occupier; and scarcely any at all to a trespasser.

(*d*) The liability applies not only to structures dangerous in themselves, but also to structures rendered dangerous by the use to which they are put: Lord Wright in *Glasgow Corporation v. Muir*, [1933] A. C. 148, 463.

(*e*) Cf. Bohlen, *Studies in the Law of Torts* (1926), 162-163.

§§ 161, 162.

Now the contractor and the invitee are rightly separated from the ordinary law of negligence, for the duty towards the contractor is certainly higher, and the duty towards the invitee is probably wider, than that in the tort of negligence. But the extent of the duty towards the licensee is more dubious; the occupier is not answerable to him for the default of an independent contractor (*f*), and the occupier's duty does not seem to differ from that in negligence. The trespasser has no scientific standing at all under "strict duties". His very exiguous rights ought to be discussed under "Negligence", "Private defence" and "Volenti non fit injuria". But a geographical accident has drawn him and the licensee into the company of the contractor and the invitee. All four of them have this in common. They have all come upon the occupier's land or structure and suffered harm there, and they all seek to make the occupier liable. And the law therefore, conveniently if not very scientifically, considers them in the same context. We can now proceed to the details of the law.

Occupier
liable.

§ 162. Who is liable.

In the first place, the person who is primarily liable is the occupier of the structure. He may also be, indeed he often is, the owner; but an owner out of possession is not in general liable (*g*). After all, it is the occupier who has control of

(*f*) *Morgan v. Incorporated, etc., Society*, [1936] 1 A. E. R. 404 (Horrage, J.); the point was left open by the H. L. in *Shrimpton v. Herts C. C.* (1911), 104 L. T. 145.

(*g*) *Nelson v. Liverpool Brewery Co.* (1877), 2 C. P. D. 311; *Lane v. Cor*, [1897] 1 Q. B. 415; *Cavalier v. Pope*, [1906] A. C. 428. Note that in *Wilchick v. Marks*, [1934] 2 K. B. 56, the owner not in possession was held liable, but there the injury did not occur on the premises. This case was distinguished in *Howard v. Walker*, [1947] K. B. 860, where, although the tenant of the premises on which the invitee was injured was held liable, the landlord was held not liable, as he was not in possession. In *Duncan v. Cammell Laird & Co., Ltd.*, [1943] 2 A. E. R. 621, Wrottesley, J., held that the defendant, provided he was in occupation at the time when the danger came into existence, is liable even if he has ceased to be in occupation at the date of the accident. The C. A. reversed his decision, but apparently on grounds not affecting this point: (1944), 171 L. T. 186; nor was it considered in the appeal to the H. L., [1946] A. C. 401 (*sub nom. Woods v. Duncan*). Suppose that X owns land over which Y has an easement (*e.g.*, a right of way), and that Z is injured owing to a danger on that part of the land, is X or Y to be regarded as occupier of it, with respect to this branch of the law? It may be inferred from *Fairman v. Perpetual Investment Building Society*, [1923] A. C. 74 (*post*, p. 555), that whichever of X and Y has control of the safety of that part of the land must be regarded as occupier, and that it is possible for X to have such control of it with respect to a licensee, and Y with respect to an invitee. Cf. Gale,

the structure and who is best qualified to know of possible defects in it. Further, it is not essential that a person should have control of the whole of a structure, for he is held to be occupier of that part of it over which he has control; *e.g.*, where he is in charge of one particular deck of a ship which he has been hired to repair (*h*). Of course, the rules with respect to the liability of an occupier do not exclude the liability of other people if they have caused the injury; they can be sued for negligence or for any other tort constituted by their wrongdoing (*i*).

§§ 162, 163.

Next, what is the duty of the occupier towards a person coming upon the structure? That depends upon the answer to another question. Why did he come there? As we have seen, he may have entered in pursuance of a contract with the occupier, or as an invitee, or as a licensee, or as a mere trespasser (*j*). We will take these in the descending degrees of duty owed to each of them.

§ 163. Duty under contract. Rule in *Francis v. Cockrell*.

Contract.

Where A enters B's structure under a contract entitling him to do so, it is an implied term in the contract that the structure shall be reasonably fit for the purpose for which it is intended; but this does not extend to any unknown defect incapable of being discovered by reasonable means.

Rule in
Francis v.
Cockrell.

Such was the effect of the decision of the Exchequer Chamber in 1870 in *Francis v. Cockrell* (*k*). B had hired an

Law of Easements (11th ed.), 446. It is true that in *Fairman's Case* no reference was made to the existence of an easement, but in *Miller v. Hancock*, [1893] 2 Q. B. 177, it was held that there was an easement, and although that case was overruled in *Fairman's Case*, the House of Lords said nothing to indicate that the earlier decision was wrong on this point.

(*h*) *Hartwell v. Grayson Rollo and Clover Docks, Ltd.*, [1947] K. B. 901.

(*i*) *Parry v. Smith* (1879), 4 C. P. D. 325; *Dominion Natural Gas Co., Ltd. v. Collins*, [1909] A. C. 640; *Kimber v. Gas Light and Coke Co.*, [1918] 1 K. B. 439; *Howard v. Farmer & Son, Ltd.*, [1938] 2 A. E. R. 296; *Buckner v. Ashby & Horner, Ltd.*, [1941] 1 K. B. 321, 337; *Haseldine v. Daw & Son, Ltd.*, [1941] 2 K. B. 343; *Whitby v. Burt, Boulton and Hayward, Ltd.*, [1947] 1 K. B. 918. All these cases relate to the liability of an independent contractor employed by the occupier.

(*j*) A neat exposition of the law as to these classes is given by Hamilton, L.J., in *Latham v. R. Johnson & Nephew, Ltd.*, [1913] 1 K. B. 398, 410—413. In some of the cases terminology is rather confused; thus an invitee has been called a "licensee with an interest" (*Sutcliffe v. Chentis Investment Co., Ltd.*, [1924] 2 K. B. 746), and a licensee has been styled an "invitee" (Lord Hanworth, M.R. in *Oldham v. Sheffield Corporation* (1927), 136 L. T. 681, 688), but the context generally clears up the meaning. In the American Restatement of the Law of Torts, § 341, "licensee" is used to include "business visitor", which is equivalent to our "invitee".

(*k*) L. R. 5 Q. B. 501 (W. Cases, 241).

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apparently competent independent contractor to erect a grandstand for the purpose of viewing steeplechases at Cheltenham. B charged each spectator 5s. for admission to the stand. A, having paid his 5s., entered the stand and was injured by its collapse. This was due to its negligent construction by the contractor, although B was not aware of the defect and was not negligent himself. B was held liable to A on the principle stated above which has been repeatedly followed in later decisions (l).

Duty not
absolute.

The duty is certainly not an "absolute" one. In *Hall v. Brooklands Auto Racing Club (m)*, a spectator who had paid for admission to the defendants' racing track for automobiles was injured in the following circumstances. Two cars were finishing a race at over 100 miles an hour. One touched the other which thereupon shot into the air over a kerb six inches in height bordering the track, a grass margin next to it four feet five inches in width, and hit an iron railing four and a half feet in height enclosing the strip of grass and thus hurt the spectator. The course had been opened some twenty-six years earlier and no accident like this had occurred before. The spectator sued the defendants who were held not liable by the Court of Appeal. Their duty was to see that the course was as free from danger as reasonable care and skill could make it, but they were not insurers against accidents which no reasonable diligence could foresee or against dangers inherent in a sport which any reasonable spectator could foresee and of which he took the risk. The decision has been criticised on the application of the principle to the facts of the case but the principle itself is unquestioned (n).

Higher than
towards
invitee.

The rule in *Francis v. Cockrell* was considered by McCardie, J., in *Maclean v. Segar (o)* to impose upon the occupier a duty higher than that towards an invitee. The scope of that duty is considered in the next section and is known as the "rule in *Indermaur v. Dames*". In *Maclean v. Segar* the plaintiff was a guest at the defendant's hotel when a fire broke out owing to a defective mode of conveying smoke and soot from the kitchen chimney. There was no fire escape

(l) *E.g.*, *Silverman v. Imperial London Hotels, Ltd.* (1927), 43 T. L. R. 260.

(m) [1933] 1 K. B. 205.

(n) 49 L. Q. R. (1933), 156—158, 332. Cf. *Whitby v. Brock & Co.* (1888), 4 T. L. R. 241, which was not cited in *Hall's Case*.

(o) [1917] 2 K. B. 325, 329—330. Cf. *Gillmore v. L. C. C.*, [1938] 4 A. E. R. 331; *Pope v. St. Helen's Theatre, Ltd.*, [1946] 2 A. E. R. 440.

(but the jury found that this did not constitute negligence) and the plaintiff tried to escape by knotting the bed-clothes together and using this as a rope. She fainted in her descent, fell and was injured. The defendant was held liable to her. McCardie, J., referred (p) to the rule in *Francis v. Cockrell* as setting up an "implied warranty" (as contrasted with the rule in *Indermaur v. Dames*) that the premises are as safe as reasonable care and skill can make them; and the occupier is liable if any person concerned with the construction, alteration, repair or maintenance of the premises could by reasonable skill and care have discovered the defect in them which caused the damage. Thus the occupier may be liable not only for the default of himself, of his servants and (in certain circumstances) of an independent contractor (as in the rule in *Indermaur v. Dames*) but also for a defect in the premises which was there before he acquired them and which any one (whether the predecessor in title, or the occupier himself, or anybody else) ought to have discovered by reasonable skill and care and eliminated (q).

If the plaintiff knew of the danger, that will not by itself prevent him from recovering, but it may be evidence of *volenti non fit injuria* or of contributory negligence (r).

There are two exceptions to the rule in *Francis v. Cockrell*. Exceptions

(1) Where the terms of the contract exclude it. If the contract does not modify the rule either expressly or by implication, then the rule applies. But the terms of the contract may be such that, properly interpreted, they do not imply a warranty of immunity against the particular accident which occurred. If you buy from A a ticket for a seat in A's theatre in order to see a play produced there by B, of course there is a contract between you and A; and that contract puts A under the duty in *Francis v. Cockrell* with respect to the safety of the structure; but it does not (unless it expressly

(1) Contract excluding liability.

(p) [1917] 2 K. B. 332—333.

(q) Sir Frederick Pollock, *Torts*, 409, regarded the duty as wider in *Francis v. Cockrell*, because "implied warranties of this class exclude any question of what the warrantor knew or ought to have known". He adds, however, that *Francis v. Cockrell* does not apply to latent defects. But are not such defects exactly those which the warrantor neither knows nor ought to have known? If so, does not the exception cancel the rule? See Kelly, C.B., in *L. R.* 5 Q. B. at p. 508.

(r) *Williams v. Birmingham Battery Co.*, [1899] 2 Q. B. 338; Scrutton, L.J., in *Hall v. Brooklands Auto Racing Club*, [1933] 1 K. B. 205, 209—218; *Dunster v. Hollis*, [1918] 2 K. B. 795, 803.

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states this) make A liable for the negligence of B and B's actors. A may possibly be liable to you under the rule in *Indermaur v. Dames* for breach of his duty towards you as an invitee to his premises, but that liability is entirely independent of contract and is founded on tort alone. That is the effect of a series of decisions of which *Cox v. Coulson* (s) is typical. A was the lessee and manager of a theatre. He arranged with B for the performance of a play. The plaintiff bought (presumably from A) a ticket for it. An actor in B's company fired a pistol in the course of the play. The cartridge was supposed to be blank but, owing to the negligence of some one, it contained a bullet which hit and injured the plaintiff. It was held by the Court of Appeal that the contract between A and the plaintiff did not include a warranty that there should be no negligence on the part of B's servants and that the rule in *Francis v. Cockrell* therefore did not apply; but the Court also held that A and the plaintiff were in the position of invitor and invitee respectively, and therefore the rule in *Indermaur v. Dames* (see § 164, *post*) covered the facts, and they ordered a new trial to inquire whether A was liable under that rule through inadequate supervision of the firearms used. So, too, a contract made by the plaintiff with A for admission to A's place of amusement does not necessarily imply a warranty of the safety of B's side-show which is one of the entertainments of the place (t).

(2) Sale or lease of dangerous premises.

(2) Where the injury arose from the defective state of land or of a ruinous house, sold or let by the defendant, he is not liable, apart from express contract, unless he has acted fraudulently (u).

With respect to a house, the reason given by Erle, C.J., in

(s) [1916] 2 K. B. 177. *Fraser-Wallas v. Waters* (1939), 162 L. T. 136, was really an ordinary case of negligence, for the defendants were not occupiers, and the relation of invitor and invitee was therefore inapplicable.

(t) *Sheehan v. Dreamland (Margate), Ltd.* (1923), 40 T. L. R. 155. In *Humphreys v. Dreamland (Margate), Ltd.* (1930), 100 L. J. K. B. 137, there was no contract between A and plaintiff. *Welsh v. Canterbury, etc., Ltd.* (1894), 10 T. L. R. 478, is reported too scantily to make it of any value. In *Salmond, Torts*, § 128 (3), much the same result is reached as in the text above, but by a different interpretation of the case law. The relation of master and servant is also included in the discussion, but we have preferred to take that in § 32, *ante*.

(u) For American law, see Bohlen, *Studies in the Law of Torts* (1926), 67—108, 202—251.

1863 (a) and constantly repeated in later cases (b) was that "fraud apart, there is no law against letting a tumble-down house". With respect to land let, the reason is that, when a tenant takes land he must (subject to any stipulation in the lease) look and judge for himself in what state it is; "*caveat lessee*" (c): so, too, for the purchaser of land, the rule is *caveat emptor* (d). Hence, one who lets or sells land with some dangerous object upon or over it, such as a poisonous or rotten tree which projects from land retained by him into the air-space above the land that he has let or sold, is not liable for consequent injury, even if he knows of the danger or has actually brought it about himself (e).

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The exception certainly excludes the rule in *Francis v. Cockrell*, but not the duty owed by the occupier to those who come in the lower categories of invitee or (probably) licensee; for if the vendor or lessor of the house retains possession and control of that part of the house in which the defect exists, he must reveal to any licensee using that part the existence of the defect if it is a concealed trap or danger and he knows of it. Thus in *Fairman v. Perpetual Investment Building Society* (f), the landlord of a block of flats had retained possession and control of the common staircase in which there was a defect that injured the plaintiff, a licensee, who would have been able to recover damages against the landlord but for the fact that the danger was obvious to her and was therefore not a trap (g). Now suppose that she had been, not a licensee, but an invitee, would she have been entitled to the still greater degree of immunity accorded to such a person, or would the exception as to ruinous houses have excluded that immunity? There is no direct authority on the point (h), but as liability in the law about dangerous structures depends upon occupation and as

(a) *Robbins v. Jones*, 15 C. B. (N.S.) 221, 240

(b) *E.g.*, Lord Macnaghten in *Cavalier v. Pope*, [1906] A. C. 428, 430; Scrutton, L.J., in *Bottomley v. Bannister*, [1932] 1 K. B. 458, 469.

(c) *Cheater v. Cater*, [1918] 1 K. B. 247, 252, 255, 256.

(d) Williams, *Vendor and Purchaser* (4th ed. 1936), 637-639, 759-761.

(e) *Cheater v. Cater*, [1918] 1 K. B. 247; *Shirvell v. Hackwood Estates, Ltd.*, [1938] 2 K. B. 577; *Davis v. Fools*, [1940] 1 K. B. 116. Cf. 54 L. Q. R. (1938), 459-462; 2 *Modern Law Review* (1938), 215-221.

(f) [1923] A. C. 74 (W. Cases, 247).

(g) [1923] A. C. 95-96, where Lord Wrenbury uses "owner" as equivalent to "occupier".

(h) *Cunard v. Antifyre, Ltd.*, [1933] 1 K. B. 551, goes near it; nor is a dictum of Greer, L.J., in *Shirvell's Case*, [1938] 2 K. B. 577, 594-595, really hostile to the *Cunard Case*.

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the landlord was the occupier of the staircase, there is no reason to think that she would have been in a worse position than any other invitee, and the landlord's duty would accordingly have been that of any ordinary invitor (i); nor is there any decision which is inconsistent with this inference, for in all the cases in which the exception now under discussion applied the vendor or landlord had ceased to be in occupation of the ruinous house which caused the injury (k).

The exception applies whether it is the tenant or buyer of the house or land who is injured or some third party. Thus in *Cavalier v. Pope* (l), the landlord of a dilapidated house contracted with the tenant to repair it, but failed to do so. The tenant's wife was injured in consequence. The landlord was held not liable in contract because there was none with her, nor in tort because the exception applied. The same applies to the tenant's servant (m).

If there is fraud on the part of the vendor or landlord, he is liable. But what is fraud? Mere knowledge of the defect is not, but presumably active concealment of it is.

Donoghue's Case does not affect exception.

Although a landlord is not liable under this exception he may be for nuisance in circumstances which have already been explained (*ante*, pp. 461—466). A strenuous but unsuccessful attempt was made in *Otto v. Bolton* (n) to evade the exception by applying to ruinous houses the doctrines set forth in *Donoghue v. Stevenson* (o). It will be recollected that one of these doctrines defined the scope of duty in the tort of negligence (p) and the other the duty of a manufacturer in putting in circulation a dangerous chattel (q). In *Otto v. Bolton*, A sold to B a newly-built house which was so negligently constructed that the ceiling of one of the bedrooms fell upon and injured B and C (the mother of B) who was staying in the house. Both B and C sued A. B's claim was based upon breach of contract and, as A had

(i) *Gorell Barnes, P.*, in *Malone v. Laskey*, [1907] 1 K. B. 141, 152—153, seems to support this.

(k) See the cases already cited, and add *Lane v. Cox*, [1897] 1 Q. B. 415; *Otto v. Bolton*, [1936] 2 K. B. 46 (W. Cases, 237).

(l) [1906] A. C. 428; *Shirvell's Case*, [1938] 2 K. B. 577.

(m) *Shirvell's Case*, [1938] 2 K. B. 577.

(n) [1936] 2 K. B. 46 (W. Cases, 237).

(o) [1932] A. C. 562 (W. Cases, 154).

(p) *Ante*, p. 401.

(q) *Ante*, p. 544. The rest of the paragraph in the text above was approved by Lewis, J., in *Travers v. Gloucester Corporation*, [1947] 1 K. B. 71, 89.

expressly assured B that the house was well built, A was held liable for a breach of warranty to that effect. C's claim was for negligence, but Atkinson, J., held that A was not liable because there was nothing in *Donoghue v. Stevenson* which had qualified the law about ruinous houses. That side of *Donoghue's Case* which referred to dangerous chattels was inapplicable, for a house is not a chattel and even if it were reckoned as such, the plaintiff had had a reasonable opportunity of examining it; that side of it which referred to the scope of duty in negligence was equally inapplicable because the House of Lords in *Cavalier v. Pope* (r), decided many years before *Donoghue's Case*, had held that no legal duty existed with respect to a ruinous house, and legal duty is an essential of the tort of negligence. It is difficult to see how the learned Judge could have reached any other conclusion; but the law is not satisfactory on this point and it is quite likely that if no one had ever sued in tort for injury arising from a ruinous house until after Lord Atkin's definition of legal duty in *Donoghue's Case*, the defendant in *Otto v. Bolton* would have been held liable, for he would have been the "neighbour" of the plaintiff within the terms of that definition. What conceivable difference is there between carelessly putting in circulation a dead snail in a bottle of ginger-beer and putting on the market a house so carelessly built as to be likely to cause death or grave injury? The exception which denies a remedy in the latter case had a very questionable historical origin (s) and it gave such a charter of immunity to the jerry-builder that the Housing Act, 1925 (t) (re-enacted on this point by the Housing Act, 1936 (u)), made a partial qualification of it in favour of the tenant; but nothing except further legislation will confer any similar remedy on a third person injured in this way (a).

§ 164. Liability in tort to an invitee. Rule in *Indermaur v. Dames* (b).

The duty of the occupier in tort differs according as the plaintiff is an invitee (or "licensee with an interest"), or

(r) [1906] A. C. 428.

(s) 52 Law Quarterly Review (1936), 313—315.

(t) 15 Geo. 5, c. 14, s. 1.

(u) 26 Geo. 5 & 1 Edw. 8, c. 51, s. 2.

(a) The American Restatement of the Law of Torts, §§ 351—362, incorporate rules more humane to the lessee and purchaser. See also Dr. Glanville Williams in 5 Modern Law Review, 194—215.

(b) See Dr. Friedmann, 21 Canadian Bar Review, 79—90.

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a licensee (or "bare licensee"), or a trespasser (c). And first of the invitee. He is one who comes upon the structure in pursuance of some business or material interest common to him and to the occupier. A usual example is the person who enters a shop or other place of business with a view to doing business with the shopkeeper or proprietor whether or not he actually buys anything or otherwise does business (d).

Rule in
Indermaur
v. *Dames*

The occupier's duty towards him is expressed by the rule in *Indermaur v. Dames* laid down in 1866 (e). The plaintiff was a journeyman gas-fitter employed by X. Under a contract with the defendant, X had fixed a patent gas-regulator in the sugar-refinery of the defendant. X had directed the plaintiff to test some burners on the premises in connexion with this regulator. While doing so, the plaintiff without any fault on his own part fell through an unfenced shaft and was injured. The defendant was held liable to him. There was no earlier decision exactly in point (f) and the judgment of the Court of Common Pleas, which was delivered by Willes, J., was the starting-point of a new form of tortious liability. The essential part of it was as follows (g):—

"The class to which the customer belongs includes persons . . . who go upon business which concerns the occupier, and upon his invitation, express or implied. And with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be

(c) Lord Hailsham, L.C., in *Addie & Sons, Ltd. v. Dumbreck*, [1929] A. C. 358, 364—365.

(d) *Indermaur v. Dames* (1866), L. R. 1 C. P. 274, 287. *Griffiths v. Smith*, [1941] A. C. 170, exemplifies this, though the decision was upon another point. In *Haseldine v. Daw & Son, Ltd.*, [1941] 2 K. B. 343, 352—353, Scott, L.J., denied that community of interest is necessary in the relation of invitor and invitee, but Goddard, L.J. (at p. 371), took the opposite view, which is also supported by *Hyett v. G. W. Ry.*, [1947] 2 A. E. R. 264. Cf. 58 L. Q. R. 17.

(e) L. R. 1 C. P. 274; affirmed L. R. 2 C. P. 311 (W. Cases, 244).

(f) In *Southcote v. Stanley* (1864), 1 H. & N. 247, 250—251, Bramwell, B., had emitted some *dicta* about the invitee which appeared to put him on a level with the licensee, but the problem was not really attacked until *Indermaur v. Dames*: see Pollock, Torts, 407.

(g) L. R. 1 C. P. at p. 288.

determined by a jury as a matter of fact." The occupier's duty refers not only to the structural safety of the premises or structure, but also to the use which he himself makes of them, or which he permits a third party to make of them (*h*); but where the occupier is carrying on a dangerous, but lawful, business, he is under no absolute duty to safeguard the invitee; his high duty to take care does not amount to a guarantee against harm (*i*).

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The rule stated above (in inverted commas) was adopted without hesitation in later cases both here and in America (*j*). It falls short of strict liability of the kind set up in *Rylands v. Fletcher* (*k*), for reasonable care is a defence (*l*), but the inference from later developments of it is that it creates a stricter duty than that in negligence on the principle that the increased risk of latent defects in most modern structures casts a higher duty upon the occupier of them (*ante*, pp. 549—550). Moreover, the occupier is, to some extent, liable for the default of an independent contractor employed by him. On this point, some of the decisions, or at any rate *dicta* in them, made it difficult to state the limits of the occupier's liability (*m*); but in *Woodward v. Mayor of Hastings*, [1945] 1 K. B. 174, the Court of Appeal cleared up some of the doubts, and the result of that case and of earlier cases may perhaps be summarised as follows. The occupier of land or of a structure is liable to an invitee for the default of an independent contractor except where he (the occupier) has satisfied the following conditions: (1) he must have used reasonable care in selecting the contractor; *i.e.*, he must have had reasonable grounds for believing the contractor to be competent for the work that he was employed to do; and

(*h*) Lord Wright in *Glasgow Corporation v. Muir*, [1943] A. C. 448, 462.

(*i*) Lord Uthwatt in *Read v. Lyons*, [1947] A. C. 156, 185—186.

(*j*) British cases are collected in 36 English and Empire Digest, 35—45.

(*k*) (1868), L. R. 3 H. L. 330; *ante*, § 140.

(*l*) *E.g.*, *Simons v. Winstlade* (1938), 159 L. T. 408.

(*m*) In favour of the liability were Luxmoore, L.J., in *Wilkinson v. Rea, Ltd.*, [1941] 1 K. B. 688 (MacKinnon, L.J., agreed with him, but delivered no separate judgment); Bigham, J., in *Marney v. Scott*, [1899] 1 Q. B. 986, 989, 990; and Tucker, J., in *Canter v. Gardner & Co., Ltd.* (1939), 56 T. L. R. 305. In *Haseldine v. Daw & Son, Ltd.*, [1941] 2 K. B. 343, *dicta* of Scott and Goddard, L.J.J., raised the inference that the liability did not exist, but the comments on that case in *Woodward v. Mayor of Hastings*, [1945] 1 K. B. 174, show that this inference is incorrect. The American Restatement of Torts makes the occupier liable in general: § 344 and Ch. 13. As to the liability of the independent contractor himself, see the cases cited *ante*, p. 551, note (*g*).

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(2) he must have exercised reasonable supervision, in so far as intelligent supervision was possible, over the execution of the work undertaken by the contractor, while the latter was engaged in executing it; and (3) he must have used reasonable care to detect any danger which, after the work was completed, existed on the land or structure owing to faulty execution of the work by the contractor (n). If, having fulfilled these conditions, the danger created on the land or structure is one which the occupier neither detected nor could reasonably have detected, he ought not to be liable to the invitee. Where the invitee is injured by a danger created while the work is still in process of execution, the occupier need satisfy only conditions (1) and (2). As to (2), it must be observed that intelligent supervision may be impossible where the occupier has not the technical knowledge requisite to make him realise whether the work is being properly done; nor, even if he has that knowledge, can he be expected to spend his whole time in watching the technician at work on a job that he is presumably competent to achieve (o). So, too, with respect to (3), the question of the occupier's fulfilment of this condition must be pre-eminently a matter of fact. The danger left by the contractor may be such that technical skill or knowledge would be needed to detect it (p). The landlord of a block of flats cannot be expected to have the expert knowledge of the electrical or hydraulic engineer whom he has employed. On the other hand, the craft of a charwoman may have its mysteries, but it is not so technical, at any rate with respect to cleaning snow-covered steps, as to make detection of defects in her work impossible for her employer (q).

Qualifica-
tion as to
highway.

A qualification of the rule in *Indermaur v. Dames* is that where the owner of land dedicates the surface of it as a highway for the public and (as is usually the case) remains in occupation of the soil over which the highway passes, then the public, whether they be invitees or licensees, must

(n) The same applies to a structure (e.g., a ship) delivered by the contractor to the occupier with a dangerous defect in it: *Marney v. Scott*, [1899] 1 Q. B. 986.

(o) See the hypothetical case put by Goddard, L.J., in *Clelland v. Eduard Lloyd, Ltd.*, [1935] 1 K. B. 272, 276; and the decision in *Canter v. Gardner & Co., Ltd.* (1939), 56 T. L. R. 305.

(p) See the passage in Scott, L.J.'s judgment in *Haseldine v. Dau & Son, Ltd.*, cited by the C. A. in *Woodward v. Mayor of Hastings*, [1945] 1 K. B. at pp. 182—183.

(q) *Woodward v. Mayor of Hastings*, [1945] 1 K. B. 174.

take the highway as they find it (r). It may be full of ruts and holes at the date of dedication or become ruinous later, and it may be that, if there is a highway authority in charge of it, the authority is liable for misfeasance; but for mere omission the occupier is not liable, although he may be if he digs a pit in it (s). There is no injustice in this, for dedication may be not only express but also implied from circumstances. Where it is express, it would be unfair to compel the occupier to go to the expense of making further concessions to the public beyond the scope of his original intention; where it is implied and the public have acquired the right of way by mere acquiescence on his part, it is often hard upon him that they have acquired the right at all, and it would be doubly so if he were forced to keep the way in repair (t).

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The invitee must use reasonable care himself, nor does the duty extend to any one who is injured by going where he is expressly or impliedly warned by the occupier not to go, as where a man falls over a cliff by getting on the wrong side of railings erected by the proprietor who has also put up a notice of the danger of going near the cliff (u); or where a tradesman's boy deliberately chooses to go into a pitch-dark part of the premises not included in the invitation and falls downstairs there (a). Further, the duty does not protect an invitee who goes to a part of the premises where no one would reasonably expect him to go (b). Again, the plaintiff cannot succeed if, although rightly on the structure, he makes a use of it alien to the invitation. "When you invite a person into your house to use the staircase you do not invite him to slide down the banisters" (c). So, too, where a stevedore in loading a ship was injured by making use of the hatch covers for loading, although he knew that a statutory regulation forbade this practice in his own interests, it was held

Invitee must use reasonable care.

(r) Pratt & Mackenzie, *Highways* (18th ed. 1932), 17-19.

(s) Willes, J., in *Gautret v. Egerton* (1867), L. R. 2 C. P. 371, 373.

(t) Blackburn, J., in *Cooper v. Williams* (1862), 31 L. J. Q. B. 212, 218.

(u) *Anderson v. Coutts* (1894), 58 J. P. 369.

(a) *Lewis v. Ronald* (1909), 101 L. T. 534.

(b) *Mersey Docks and Harbour Board v. Procter*, [1923] A. C. 253, where there was a great difference of opinion as to the application of this principle to the facts; cf. *Walker v. M. R. Co.* (1886), 55 L. T. 489; *Lee v. Luper*, [1936] 3 A. E. R. 817; *Gould v. McAuliffe*, [1941] 2 A. E. R. 527. *Campbell v. Shelburne Hotel, Ltd.*, [1939] 2 K. B. 534, was really a case of contract falling under the rule in *Francis v. Cockrell* (*ante*, § 163).

(c) Scrutton, L.J., in *The Carlgarth*, [1927] P. 93, 110.

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that he had no remedy (*d*). In fact, in all these cases the plaintiff ceases to be an invitee and becomes a mere trespasser (*c*).

Volenti non fit injuria.

• When the invitee is injured in making a proper use of the structure and was aware of the danger, it is useless to plead against him *volenti non fit injuria* unless he freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, expressly or impliedly agreed to incur it. In *Letang v. Ottawa Electric Ry.* (*f*) the plaintiff was an invitee on the defendants' premises where there were some stairs coated with ice of which she was given no warning and which they had made no attempt to remove. She did her best to avoid slipping by holding on to a rail, but in spite of this she slipped and was injured. The defendants were held liable, for even if the plaintiff saw the danger of slipping, she neither realised the extent of the risk nor did she freely and voluntarily encounter it. Mere knowledge of a risk is no more consent to it in this connexion than in any other part of the law of tort.

Ambiguity of the rule.

Two problems in connexion with the rule are still unsettled. The first arises from an ambiguity in its terms. The occupier must "use reasonable care to prevent damage from unusual danger which he knows or ought to know" (*g*). Two different interpretations have been put upon this: (i) The occupier must take reasonable care to make the structure safe. (ii) The occupier need only ascertain the existence of dangers and either remove them or give adequate warning of their existence; or, as it is stated more briefly, he need merely give warning of a trap. According to (i), a shopkeeper, if he has a staircase used by the public who enter his shop, must provide one which is reasonably safe; according to (ii), he is not liable if the staircase is obviously unsafe, for then it has ceased to be a trap (*h*).

The Court of Appeal in *Hillen v. I. C. I. (Alkali), Ltd.* (*i*), recognised the existence of the ambiguity, and as *dicta* of theirs both before and after that case are in conflict as to

(*d*) *Hillen v. I. C. I. (Alkali), Ltd.*, [1936] A. C. 65.

(*e*) Lord Atkin, *ibid.* 69—70.

(*f*) [1926] A. C. 725.

(*g*) *I.e.*, ought reasonably to know: *Simons v. Winslade*, [1938] 3 A. E. R. 774.

(*h*) Salmond, *Torts*, § 123 (3).

(*i*) [1934] 1 K. B. 455, 465—466, 470.

which meaning is correct the point is still open. In *Norman v. G. W. Ry.*, they took view No. (i) (k), but all that they actually decided was that the duty of a railway company towards an invitee is no higher than that of any other occupier of premises; in *Brackley v. M. Ry.* two of the learned Lords Justices took view No. (ii) (l), but the actual decision was only that if the invitee knew (as was the fact here) of the danger and nevertheless took the risk, she could not recover. In *Haseldine v. Dawson & Son, Ltd.*, Scott, L.J., adopted No. (i); so apparently did Goddard, L.J., but as he held the plaintiff to be a licensee, the *dictum* was *obiter*; Clauson, L.J., seems to have agreed with Goddard, L.J. (m).

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Thus no case has yet been reported in which the decision turned upon pitting these interpretations against one another. Circumstances are imaginable in which the Courts will have to select one or the other. Suppose (n) that a ship in dock is usually approached from the shore by a gangway fenced on each side, but that on a particular day A, who is responsible for the means of access to the ship, puts an unfenced plank, instead of the gangway, across the gap. Suppose that B, an employee of shippers, is directed by them to take an urgent message to be personally delivered to the master of the ship; that he reaches the dock, sees the plank and feels that he must take the apparently slight risk of crossing it because he cannot make any one hear by hailing the ship. He begins to cross it, but, over-estimating his nerve or under-estimating the risk, he falls into the water and is injured. Now here there was no trap at all, for B could and did perceive some, but not all, of such danger as there was. If interpretation (ii) were correct, he would have no remedy against A. But if interpretation (i) is to be preferred, then it is by no means certain that he could not recover, for A does not appear to have made access to the ship reasonably safe. It may be urged against this that the rule in *Indermaur v. Dames* expressly states that the

(k) [1915] 1 K. B. 584, 591—592, 595—596, 598 (cf. Pollock, Torts, 411, note (t)); so too Slessor, L.J., in *Weigall v. Westminster Hospital* (1936). 52 T. L. R. 301, 303.

(l) (1916), 85 L. J. K. B. 1596, 1604, 1607, Swinfen Eady and Phillimore, L.JJ. In Bell Yard, May. 1939. pp. 15—21, the existence of any ambiguity is denied. Cf. Pollock, Torts, 409, note (k), by Mr. Landon.

(m) [1941] 2 K. B. 343, 353, 364, 372, 374. Cf. 58 L. Q. R. 17—18.

(n) The problem put is a slight variation of *Smith v. London and St. Katharine Docks Co.* (1868), L. R. 3 C. P. 326, where the plaintiff was held entitled to recover, but at that date the ambiguity of the rule in *Indermaur v. Dames* had not been perceived.

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invitee must use reasonable care himself, and that B did not do so because he ought never to have ventured on the plank. But this gives the phrase "reasonable care" a very questionable signification. A man may still be acting reasonably even if he takes slight risks. If B had not taken this one, he would presumably have wasted time indefinitely until some member of the crew appeared or have returned to his employers merely to be rated as a poltroon. It is suggested that in fact he did what any reasonable man would have done in making the attempt to cross; for the risk was not a great one, and while the reasonable man is not expected to show unusual courage, he ought not to be penalised for exhibiting that amount which any vigorous, able-bodied man possesses. It is further submitted that fairer results would be reached by the adoption of interpretation No. (i) of the rule than No. (ii) (o).

Position
of invitee
who pays.

A second problem is whether it makes any difference to the occupier's liability that the invitee paid for his entry. Scrutton, L.J., was of opinion that it does. "The owners [here equivalent to 'occupiers'] in such a case are bound to see that the premises are reasonably safe, and if they are not safe, and the owners could know of the dangerous condition and negligently did not know of it, they are liable for damages caused"; and the learned Lord Justice regarded this as a higher duty than that towards the invitee who does not pay, for there he held that all the occupier need do is to "use reasonable care to protect him either by warning or precaution against traps, whether existing or new, dangers which the licensee [here = invitee], if ignorant of the premises, could not avoid by reasonable care and prudence"; but that, as to dangers which are not traps in this sense the occupier is not liable, that is, he does not warrant the premises to be safe or as safe as reasonable care could make them (p).

In spite of the weight that must attach to any opinion of Scrutton, L.J., the distinction appears to be unnecessary and rather confusing. We have just seen that the rule in

(o) *Brackley v. M. Ry.* (*supra*), in spite of the breadth of the *dicta* in it, does not sanction the view that if the invitee knew of the danger he can never recover. The reason why the plaintiff there could not recover was because she had taken no precaution to avoid a risk which had been made obvious to her. See, too, *Letang v. Ottawa Electric Ry.*, [1926] A. C. 725.

(p) *Hayward v. Drury Lane Theatre, Ltd.*, [1917] 2 K. B. 899, 914; *Sutcliffe v. Clients Investment Co., Ltd.*, [1924] 2 K. B. 746, 757. Followed by Swift, J., in *Silverman v. Imperial London Hotels, Ltd.* (1927), 43 T. L. R. 260.

Indermaur v. Dames has two different interpretations. The result of Scrutton, L.J.'s, view is that interpretation (i) would apply to the invitee who pays, interpretation (ii) to the invitee who does not. But this would be a somewhat artificial construction of the rule and it does not appear to be warranted by other authority. Moreover, it would raise the conundrum, "What is the difference between an invitee who pays and a contractor?" To a contractor the rule in *Francis v. Cockrell* applies, not the rule in *Indermaur v. Dames*. Now an invitee who pays for admission is a contractor. He is adequately protected by the rule in *Francis v. Cockrell* except where the terms of the contract cannot be construed as covering the risk or where, for some reason or other, the invitee cannot rely upon the contract (e.g., where it ought to have been evidenced in writing and is not). In these exceptional cases it may be that the *dictum* of Scrutton, L.J., would apply, but one can only guess that this correctly represents his views. Indeed, some later *dicta* of his make the strength of his belief in them somewhat doubtful (q). Still more recently Scott, L.J., deprecated an attempt to add to the ordinary classification of contractors, invitees, licensees and trespassers such terms as "licensee for payment" (r).

A question which has been raised in the law Courts but which has never been adequately discussed, much less solved, is the position of one who enters "as of right" on the structure. This vague expression appears to include at least two kinds of people (and quite possibly it may include others): first, those whom the occupier has no legal right to keep out, such as a policeman in the execution of a warrant; secondly, those who enter land or structures under the control of public bodies (e.g., municipal authorities) or public utilities (e.g., railway companies) which, acting under the powers vested in them, have conferred the right of entry. Under this second class fall members of the public who go into a public recreation ground or a public library, or who enter a railway station with a view to buying a ticket there

Position of one who enters "as of right"

(q) In *Hall v. Brooklands Auto Racing Club*, [1933] 1 K. B. 205, 213, he regarded the existence of the distinction between the invitee who pays and the invitee who does not as an open question, but in *Purkis v. Walthamstow B. C.* (1934), 151 L. T. 30, 32, and *Liddle v. Yorks (North Riding) C. C.*, [1934] 2 K. B. 101, 109, he seems to have veered again in favour of the distinction.

(r) *Weigall v. Westminster Hospital* (1936), 52 T. L. R. 301, 303.

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or to making inquiries on matters connected with travel. As to both classes, are they to be reckoned as a peculiar category distinct from invitees or licensees? If so, what is the occupier's duty towards them? If they are not in a separate category, are they invitees or licensees? If they can definitely be said to fall under one or other of these two heads, is the occupier's duty towards them under that head different from his duty towards other people under it? Not one of these queries can be confidently answered.

It should be clearly understood at the outset that we are confining the discussion to persons who come within the ambit of the particular right of entry assigned to them. If I drive my car into a public park which I know to be prohibited to automobiles and an accident occurs to my car owing to negligence on the part of the authority in charge of the park and I suffer personal injuries in consequence, I am in no better position than a trespasser, for I never had any right of entry in that mode. So, too, if a policeman goes on premises for a purpose not authorised by his official duty or by the assent of the occupier, he is a mere trespasser (s). And the converse of the proposition holds. A person may possibly enter public premises for some purpose which unquestionably puts him in the position of an invitee or of a contractor irrespective of any "right of entry" common to him and the general public; e.g., the librarian of a public library or a passenger on a railway who has paid for his ticket or has at least been accepted by the company as a passenger (t). It is not with cases like this that we are concerned, but with the person who satisfies the conditions of the "right of entry" and relies upon that and upon nothing else in his claim for injuries against the occupier.

The balance of opinion is against erecting such people into a separate class. It is true that Maugham, L.J., in *Purkis v. Walthamstow B. C.* (u) favoured the idea of putting local

(s) *Great Central Ry. v. Bates*, [1921] 3 K. B. 578. But the assent of the occupier may quite well turn him into an invitee or a licensee according to circumstances, for he does not cease to be a private individual merely because he is not acting in his public capacity; if I ask a policeman to dinner at my house, he is neither more nor less a licensee than any other guest of mine. Cf. 52 L. Q. R. (1936), 461—462.

(t) *Austin v. G. W. Ry.* (1867), L. R. 2 Q. B. 442.

(u) (1934), 151 L. T. 30, 34—35.

authorities in a special category, but Greer, L.J. (a), preferred to adopt the opinion of Lord Hailsham, L.C., in *Addie & Sons, Ltd. v. Dumbreck* (b), that in the law of tort there are no other classes besides those of invitees, licensees and trespassers (c); and this was the view of the Court of Appeal in *Sutton v. Bootle Corporation* (d).

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Assuming that this classification is exhaustive, is a person who enters as of right an invitee or a licensee? To this no general answer is possible on the authorities as they now stand, but in two specific instances of entry as of right, there are definite pronouncements of the Court of Appeal: they are (i) recreation grounds; (ii) railway premises.

Is he licensee or invitee?

As to (i), Lord Atkinson in *Glasgow Corporation v. Taylor* (e) apparently considered the entrant to be an invitee, but in later cases the Court of Appeal, after some hesitation, has settled that he is a licensee and that the municipal authority is liable only for a concealed danger of which it knows (f). With due respect, it may be questioned whether the law is satisfactory here. We would suggest that the entrant ought to be an invitee rather than a licensee, for he enters the place in pursuance of a material interest common to him and to the occupier. It is to the interest of persons in the town (whether ratepayers or not) that they should have the amenities of parks and the like, and to the interest of the municipal body that the town should have a reputation for adequately providing or maintaining them. The interest is more impersonal than that created by private law, e.g., shop-keeper and prospective customer, but that is not a conclusive reason for differentiating them. If the provision of public

(a) *Ibid.* 33; and again in *Liddle v. Yorks (North Riding) C. C.*, [1934] 2 K. B. 101, 119.

(b) [1929] A. C. 358, 364; expressed with even more vigour by Lord Dunedin at pp. 371—372.

(c) The American Restatement of the Law of Torts, §§ 342, 345, distinguishes those who enter land for a public or private purpose from gratuitous licensees, but makes the possessor's duty towards them the same. In § 347 public utilities are isolated from the other categories and put under a more severe duty. Cf. Bohlen, *Studies in the Law of Torts* (1926), 156—201.

(d) [1947] 1 K. B. 359, 366 (Asquith, L.J., whose colleagues both agreed with him).

(e) [1922] 1 A. C. 44, 51 (W. Cases, 250).

(f) *Sutton v. Bootle Corporation*, [1947] 1 K. B. 359, following *Coates v. Rawtenstall Corporation* (1937), 157 L. T. 415, and *Ellis v. Fulham B. C.*, [1938] 1 K. B. 212. In *Purkis v. Walthamstow B. C.* (1934), 151 L. T. 30, 32, Scrutton, L.J., had put the problem, but had supplied no direct solution of it. In *Ellis's Case* (at p. 221), Greer, L.J., preserved an open mind on the point, but in *Coates' Case* (at p. 416), he regarded the plaintiff as a licensee.

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places for recreation is a fulfilment of civic life and not merely an ornamental adjunct of it, those who take advantage of it ought to be entitled to something more than the "cold neutrality" of warning them against traps of which the occupier is aware (g).

As to (ii), in *Norman v. G. W. Ry.* (h) and *Brackley v. M. Ry.* (i), the Court of Appeal classified entrants on railway premises as invitees. Unfortunately, the ambiguity of the rule in *Indermaur v. Dames* (ante, p. 562) makes it uncertain what the duty is towards an invitee; and, indeed, this is apparent in the two decisions just cited, for in *Norman's Case* it was indicated that the duty is to make the premises reasonably safe, but in *Brackley's Case* that it was merely to give warning of a trap (j).

As to other species of the genus "entry as of right", we must wait for future litigation to clear up the obscurities of the term, but, as it is now settled that such an entrant must be either an invitee or a licensee and has no special position of his own, it would be better to consider each species on its merits rather than to attempt any comprehensive analysis of the genus. Thus, if the user of a public library were injured by some defect in it, it seems more practical to confine attention to the question, "What duty is owed by the authority which maintains the library towards lawful users of it?" than to embark upon the much wider inquiry, "What duty is owed by an occupier towards one who enters as of right?" If this be the correct line of investigating each case the Courts need not spend time on constructing an exact definition of "entry as of right".

Tort.

§ 165. Liability in tort to a licensee.

(2) Licensee.

A licensee (or "bare licensee") is one who has express or implied permission to enter for his own purposes, but not for the occupier's business or material interest. Such is a guest whom the occupier has asked to dinner or to stay with him (k).

(g) Cf. Maugham, L.J., in *Purkis' Case* (1934), 151 L. T. 30, 35.

(h) [1915] 1 K. B. 581.

(i) (1916), 85 L. J. K. B. 1596.

(j) Consistently with earlier decisions of lower Courts: *Longmore v. G. W. Ry.* (1865), 19 C. B. (n.s.) 183; *Lay v. M. Ry.* (1874), 30 L. T. 529.

(k) But business may be so combined with hospitality as to make the visitor an invitee, e.g., a parent asked to attend speech-day at a school where his child is a pupil: *Griffiths v. St. Clement's School, Liverpool*, [1938] 3 A. E. R. 537.

Whether the invitation be prompted by benevolence or social reasons is of no moment, for the law does not take account of the worldly advantage which the host may remotely have in view (l).

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The licensee, in order to retain his rights as such, must keep within the bounds of the permission accorded to him (m). The duty towards him may be thus stated :

The occupier must warn a licensee of any concealed danger (or trap) of which the occupier knows [or ought to know].

The words in square brackets are added in deference to conflicting *obiter dicta* (n), but the better opinion is that they cannot be supported (o).

Considerable difficulty has been experienced by the Courts in determining whether a given visitor is a licensee or an invitee or a trespasser. We must postpone the distinction between a licensee and a trespasser to the next section. As to that between a licensee and an invitee, *Fairman v. Perpetual Investment Building Society* (p) is an instructive case. The defendants owned a block of flats one of which they let to X, but they retained possession and control of the common staircase. The plaintiff lodged with X and fell down the staircase because she caught her heel in a depression worn away on one of the stairs. It was held that, although she might be an invitee *qua* X, she was merely a licensee *qua* the defendants (q); for though she had a business interest

Licensee or invitee?

(l) Hamilton, L.J., in *Latham v. R. Johnson & Nephew, Ltd.*, [1913] 1 K. B. 398, 410.

(m) *Jenkins v. G. W. Ry.*, [1912] 1 K. B. 525.

(n) In *Fairman v. Perpetual Investment Building Society*, [1923] A. C. 74, 86, 96, Lords Atkinson and Wrenbury included these words, but Bankes, L.J., in *Sutcliffe v. Clients Investment Co.*, [1924] 2 K. B. 746 754—755, regarded them as unnecessary to the decision in *Fairman's Case* and inconsistent with the earlier law. However, they were repeated by Lord Hailsham, L.C., in *Addie & Sons, Ltd. v. Dumbreck*, [1929] A. C. 358, 365, and the passage in which he incorporated them was taken over by Slessor, L.J., in *Weigall v. Westminster Hospital* (1936), 52 T. L. R. 301, 302; but it was rejected by Greer, L.J., in *Ellis v. Fulham B. Co.*, [1938] 1 K. B. 212, 221, and apparently by the C. A. in *Coates v. Rautenstall Corporation* (1937), 157 L. T. 415, and by Lord Greene, M.R., in *Baker v. Borough of Bethnal Green*, [1945] 1 A. E. R. 135, 140. The American Restatement of the Law of Torts, § 342, requires actual knowledge.

(o) Salmond, *Torts*, § 130 (3); in the 9th ed., § 135 (4), it was pointed out that, if the view were correct, there would be no difference between the duty towards a licensee and the duty towards an invitee (at any rate if the narrower interpretation of the rule in *Indermaur v. Dames* be adopted).

(p) [1923] A. C. 74 (W. Cases, 247), overruling *Müller v. Hancock*, [1893] 2 Q. B. 177, with respect to the scope of the landlord's duty.

(q) Scott, L.J., in *Haseldine v. Daw and Son, Ltd.*, [1941] 2 K. B. 843, 350, considered that the decision in *Fairman's Case* (*supra*) did not

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in the use of the stairs, yet the defendants had none in her being there. Contrast with this *Sutcliffe v. Clients Investment Co., Ltd.* (r) where A let a flat to B and agreed to contribute to the cost of its repair. B employed C, a builder, to do the work and C fixed his advertisement board to a balcony which was not part of the demised premises but was part of the exterior of the premises which A was bound to repair. When the work was finished, C's foreman went on the balcony to remove the board, part of the balcony collapsed owing to a hidden defect of which A knew or ought to have known, and the foreman was killed in consequence. A was held liable for this. The foreman was an invitee because he was doing repairs in which both A and B were interested, for although B gave the order, A was responsible to B for part of the cost. It is to be observed that here the servant of the independent contractor who had done the work for B was put upon the same footing as B himself, for the purpose of establishing a common business interest between the servant and A.

So, too, in *Weigall v. Westminster Hospital* (s) a mother who was visiting her son in a hospital where he was a paying patient, slipped upon a mat placed upon a highly polished linoleum floor cover and was injured, and it was held that she was an invitee to the hospital and could recover damages. The accident occurred in a room to which she had gone in order to consult the surgeon in charge of the case. She was therefore on business there in which both she and the hospital had a common interest. The position of relatives or friends of a non-paying patient who call merely to see him without any intention of consulting the hospital staff is more questionable. If their visits are at the times fixed for such calls, they are certainly licensees. Whether they are on the higher grade of invitees might perhaps depend on whether they are likely to make inquiries about the patient of nurses or doctors; e.g., relatives would be more likely to do so than casual visitors and ought therefore to be reckoned as invitees: but a broader view would be that visits from anybody would generally contribute to the cure or consolation of the patient

amount to holding that the plaintiff was not an invitee of the defendants; but Goddard, L.J. (at p. 372), disagreed with him.

(r) [1924] 2 K. B. 746.

(s) (1936), 52 T. L. R. 301. Distinguish *Pitt v. Jackson*, [1939] 1 A. E. R. 129. Cf. 52 Law Quarterly Review (1936), 309-310.

and thus give the visitors such a common interest in his welfare as to make them invitees rather than licensees (t). § 166.

The occupier is liable only for a concealed danger in the nature of a trap. The scope of his duty was thus described by Lord Sumner (u): "A licensee takes premises, which he is merely permitted to enter, just as he finds them. The one exception to this is that, as it is put shortly, the occupier must not lay a trap for him or expose him to a danger not obvious nor to be expected there under the circumstances. If the danger is obvious, the licensee must look out for himself: if it is one to be expected, he must expect it and take his own precautions. If he will walk blindfold, he walks at his peril, even though he is blindfolded by the action of the elements. As usual in cases of duties of care, the reasonable man is the standard on both sides. The licensor must act with reasonable diligence to prevent his premises from misleading or entrapping a licensee, who on his side uses reasonable judgment and conduct under circumstances that can be reasonably foreseen. The licensee is to take reasonable care of himself and cannot call a thing a trap, the existence of which a reasonable man would have expected or suspected, so as to guard himself from falling into it."

Liability
only for
"trap".

Upon this view, the very same thing may be a trap at one time and not at another. A staircase which may have been safe enough when a man descended it in the morning may have become a trap when he returns at night. But if any reasonable person would have observed a probable danger in the staircase, it is not a trap; much less is it to one who actually appreciates the danger and yet is injured by it through his own lack of care. Such was the fact in *Fairman v. Perpetual Investment Building Society* (a) which has already been noticed. There the plaintiff recovered nothing because she knew of the hole in the stair in which she caught her heel.

(t) In *Baker v. Borough of Bethnal Green*, [1945] 1 A. E. R. 135. The C. A. inclined to the view that a member of the public who enters an air-raid shelter is an invitee, but they found it unnecessary to decide this as they held, on the facts of the case, that the plaintiff, if treated as a licensee, could recover.

(u) *Mersey Docks and Harbour Board v. Procter*, [1923] A. C. 253, 274; adopted by Scrutton, L.J., in *Coleshill v. Manchester Corporation*, [1928] 1 K. B. 776, 788.

(a) [1923] A. C. 74. Cf. *Coleshill v. Manchester Corporation*, [1928] 1 K. B. 776; *Kerry v. Keighley, etc., Co.*, [1940] 3 A. E. R. 399.

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It should be noted that the occupier must do nothing to increase the danger of the structure when once the licensee has entered upon it, unless he notifies the licensee of the extra risk (b).

A person who is transporting a bare licensee in a vehicle (e.g., where X gives Y a lift in X's motor car) is bound to exercise reasonable care and not merely to warn him of concealed dangers (c), because "there is an obvious difference between the measure of confidence reposed and responsibility accepted in the case of a person who merely receives permission to traverse the premises of another, and in the case where a person or his property is received into the custody of another for transportation" (d).

Tort.

§ 166. Liability in tort to a trespasser.

(3) Trespasser.

The duty of an occupier towards a trespasser comes lowest in the scale (e). Here we are speaking of acts done in the ordinary user of land and not of measures taken for the defence of one's premises against trespassers; that has been considered in § 17, *ante*, and depends upon rather different principles (f). Apart from measures of defence taken by the occupier, the general rule is that a trespasser must take the land or structure as he finds it. A qualification of this is that the occupier must not, without giving warning, suddenly change the condition of his land so as to create a danger which causes injury to a trespasser, who enters unaware of the danger. This principle was laid down in *Mourton v. Poulter* (g), where children used a piece of land, owned by A but unoccupied by any one, as a playground without A's permission. A hired X to fell a large tree on the land. Many children came there to watch the operation. They were driven away by X. About an hour later the tree was held up by one root only and X knew that if he severed it the tree would fall within two minutes. He cut it without giving

(b) *Gallagher v. Humphrey* (1862), 6 L. T. (N.S.) 684.

(c) *Lewys v. Burnett* (1945), 61 T. L. R. 527.

(d) *Harris v. Perry & Co.*, [1903] 2 K. B. 219, 226.

(e) See W. O. Hart in 47 *Law Quarterly Review* (1931), 92—117; and for American law, American Restatement of the Law of Torts, §§ 333—339, and R. J. Peaslee in *Selected Essays in the Law of Torts* (1924), 341—356; for Canadian law, A. L. MacDonald in 7 *Canadian Bar Review* (1929), 665—683.

(f) 47 *Law Quarterly Review*, 101—103.

(g) [1930] 2 K. B. 183.

any warning to the children who had returned, and the tree fell and injured one of them, who sued X. The Divisional Court held that he was liable (h), and Scrutton, L.J., expressed the principle in terms that make it applicable to all trespassers, whether children or adults (i). He added that the principle had no application "where there is on the land a continuing trap" (k) i.e., where a concealed danger has been on the land for an appreciable time; but it is questionable whether this exception is entirely correct as it stands, for there are *dicta* in the House of Lords that if the occupier of land acted with "reckless disregard of the presence of the trespasser" (l), he is liable to the trespasser for injury ensuing from the recklessness. This seems to make the occupier liable even for a continuing trap if such recklessness be proved (m).

It is often hard to say whether a person is a trespasser or a licensee, but it would appear that no one is a trespasser who enters either by authority of law, or by express or implied permission of the occupier, or by the occupier's acquiescence in continued acts of trespass.

Authority of law and express permission need no illustration. A case on implied assent is *Oldham v. Sheffield Corporation* (n). The corporation, in extending a road which had previously been a *cul-de-sac*, erected a fence across the temporary end of the new portion of the road and left it unwatched and unlighted. The plaintiff drove his car after dark down the highway that led straight into the new portion of the road, which had the appearance of being a continuation of the highway, and he ran into the fence because he did not see it in time, and was injured. The new portion had not yet been dedicated as a highway and was therefore not open to the public, but the corporation were held liable because they were in occupation of the road under construction

Who is a trespasser?

(h) The decision was not, and was not intended to be, an authority on the right of private defence (*ante*, § 17); for some acts are justifiable on that ground which would not be sanctioned in the ordinary user of land. Thus, if an occupier's only way of defending himself against an armed assailant is to throw a tree upon him, he is allowed to do that just as much as to defend himself with a gun or other deadly weapon.

(i) [1930] 2 K. B. at pp. 190—191.

(k) *Ibid.* 191.

(l) Lord Hailsham, L.C., in *Addie & Sons, Ltd. v. Dumbreck*, [1929] A. C. 358, 365; Lord Dunedin in *Ercelsior Wire Rope Co., Ltd. v. Callan*, [1930] A. C. 404, 411.

(m) Cf. the Canadian decision, *C. P. R. v. Kozlyk*, [1944] 2 D. L. R. 81, and the American Restatement of Torts, vol. 2, § 334.

(n) (1927), 136 L. T. 681.

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and the circumstances were such as to make the plaintiff a licensee (o), for the mode in which they were laying out the road constituted an implied assent on the part of the corporation.

Great Central Railway Co. v. Bates (p) fell on the other side of the line. A policeman at night saw the door of X's warehouse open and entered it in order to ascertain that everything was right. He fell into an unfenced sawpit and was injured and it was held that X was not liable, as the policeman was neither an invitee nor a licensee, and that, even if he had been, there was, in the circumstances, no obligation on X to make the place safe for him. The apparent severity of the decision is explicable on the ground that the law attaches great importance to the privacy of a man's premises and that the exceptional circumstances in which it allows a policeman to enter them must be strictly limited. Here there was no suggestion that the policeman suspected a felony or that a felon was on the premises, nor had he any warrant to arrest anybody there, nor was he in pursuit of a criminal (q).

To the head of implied permission may perhaps be referred persons who call upon the occupier for purposes which may be described as of business interest to themselves and which they believe or hope may be of like interest to him but which usually excite none in the occupier or may even be distasteful to him; e.g., persons who canvass in the interest of trade, politics or religion, or who are ordinary beggars. It is quite true that many householders dislike tract distributors, pedlars and tramps, but common usage appears to sanction their visits except when they are expressly prohibited; e.g., by a notice, "No canvassers, hawkers or circulars" (r).

An example of the conversion of a trespasser into a licensee by acquiescence on the occupier's part is *Lowery v. Walker* (s). For thirty-five years the public had used a short

(o) Lord Hanworth, M.R., referred to him as an invitee, but the report read as a whole shows that he was no more than a licensee.

(p) [1921] 3 K. B. 578.

(q) The Court did not expressly say that he was a trespasser, but that is really what he was, although it is improbable that the occupier would have sued him for trespass. In spite of some unguarded dicta of Lord Steyn-dale, M.R., he was not acting in the execution of his duty: *du Parcq, J.*, in *Davis v. Lisle*, [1936] 2 K. B. 434, 439-440.

(r) Cf. *Salmond, Torts*, § 132 (4).

(s) [1911] A. C. 10

cut across a farmer's field to a railway station. He had often interfered with them in doing so, but had never taken any legal proceedings in order to stop them from trespassing in this way, because most of them were customers of his for milk. It was held that they were licensees, not trespassers, and that one of them who was mauled by a savage horse, which the farmer had turned into the field without notice, could recover against him. So, too, acquiescence in the trespasses of children, whether to public or private property, may turn them into licensees. In *Purkis v. Walthamstow B. C.* (t) a boy just over twelve years of age entered a recreation ground reserved for the use of children under that age, but it was not disputed that he was a licensee, as the defendants had previously acquiesced in other unqualified persons going there (u).

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§ 167. Liability in tort to children (a).

Children.

The disposition of children of tender years to mischief has given their elders nearly as much trouble in the law Courts as outside them, and the law about dangerous structures has been modified with respect to them in a way which may be thus formulated :

An occupier must take reasonable care to see that children, of whose presence he knows or ought to know or to anticipate and who are too young to appreciate the danger of some attractive object (b) under his control and within his knowledge, are protected against injury from that danger either by warning which is intelligible to them or by some other means.

English law has flatly declined to regard this special rule as an incident in the status of minority. In this connexion "infancy as such is no more a status conferring right, or a root of title imposing obligations on others to respect it, than infirmity or imbecility; but a measure of care appropriate to the inability or disability of those who are immature or feeble in mind or body is due from others, who know of or

(t) (1934), 151 L. T. 30.

(u) As to private property, see *Cooke v. Midland G. W. Ry. of Ireland*, [1908] A. C. 229; *post*, p. 577.

(a) For the tendencies of American law, see Restatement of the Law of Torts, § 339; Jeremiah Smith in Selected Essays in the Law of Torts (1924), 357—396; Professor Manley O. Hudson, *ibid.* 397—428; and A. L. MacDonald in 8 Canadian Bar Review (1930), 8—25.

(b) Often called a "trap" or "allurement".

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ought to anticipate the presence of such persons within the scope and hazard of their own operations" (c). Children, therefore, do not form any class separate from contractors, invitees, licensees or trespassers. They must be reckoned under one or another of these. The only respect in which a child differs from an adult is that what is reasonably safe for an adult may not be reasonably safe for a child and what is a warning to an adult may be none to a child.

Historical
development

In working out the rule stated above, Anglo-American law has undergone some changes. It has varied from the attitude of an irritable nurse, who regards castigation as more appropriate than compensation for harm which the child has brought upon itself, to that of an indulgent parent who considers that the world ought to be made a safe place for her offspring. One extreme was represented in 1866 by *Bramwell, B.*, who not only held that a child aged four years, who had crushed his fingers in the cogs of a machine exposed for sale in a public street, was unable to recover damages, but was also inclined to think that if the machine had been of specially delicate construction and had been injured by the child's fingers the child would have been liable to the owner (d). The other extreme appears in a decision of the Supreme Court of the United States in 1874 in which a railway company were held liable to a child of six or seven years whose presence they had no reason to suspect and who had trespassed to their land from the highway and had there been injured by playing with dangerous machinery (e). But on both sides of the Atlantic there has been an increasing tendency in later years to hit the mean between these Draconian

(c) Lord Sumner in *Glasgow Corporation v. Taylor*, [1922] 1 A. C. 44, 67. So, too, *Farwell, L.J.*, in *Latham v. R. Johnson & Nephew, Ltd.*, [1913] 1 K. B. 398, 407. Cf. *Bankes, L.J.*, in *Hardy v. Central London Ry.*, [1920] 3 K. B. 459, 465.

(d) *Mangan v. Atterton*, L. R. 1 Ex. 239, 240. But in *Clark v. Chambers* (1878), 3 Q. B. D. 327, 338—339, the Court impliedly rejected this view, and also regarded one who leaves a dangerous machine unguarded in a public place as guilty of very reprehensible negligence.

(e) *Sioux City and Pacific R. R. Co. v. Stout*, 17 Wall. 657. But the authority of this was much weakened by two decisions of the Supreme Court about fifty years later: *United Zinc and Chemical Co. v. Britt* (1922), 258 U. S. 268, and *New York N. H. and H. R. R. Co. v. Fruchter* (1922), 260 U. S. 141. The Restatement of the Law of Torts (1934), pp. 926—927, appears to adopt *Stout's Case* in a modified and more acceptable form. The cases down to 1924 are carefully analysed by Professor Manley O. Hudson in *Selected Essays on the Law of Torts*, 397—428.

and humanitarian views (f), and in English law at any rate "reasonable care" in the above rule is generally interpreted by the Courts so as to follow the *via media*. § 167.

The main points in the present law are contained in a series of unanimous decisions of the House of Lords. The first was *Cooke v. Midland G. W. Ry. of Ireland* (g). A child, four years of age, was injured by playing with a turn-table left unlocked (and therefore dangerous to children) on the defendants' land. He had approached the turn-table through a gap in a hedge from which a track, more or less defined, led to the turn-table. A notice-board stood in the vicinity and there was some evidence that it prohibited trespassers, but it had been habitually disregarded by trespassers to the knowledge of the defendants' servants, and in any event must have been unintelligible to the child. Indeed, children had, also to the knowledge of the defendants, gone upon the land so frequently that the House of Lords held that this was sufficient evidence to justify the trial Judge in letting the case go to the jury on the question whether it was owing to the defendants' fault that the fence was defective, that the child was allowed through the hedge and up to the turn-table and that the accident occurred. The jury answered all the questions in favour of the plaintiff. The decision encountered a good deal of hostile criticism and possibly misunderstanding (h). However, in later cases the House of Lords explained and defended it, and the result of these and similar expositions by the Court of Appeal seems to be this: The evidence in *Cooke's Case* tended to show, first that the child was certainly not a trespasser, but at least a licensee, and moreover a licensee with respect not only to the piece of ground where the turn-table was, but also to the turn-table itself; and, secondly, that the turn-table was a trap (i).

Present law.
Cooke's Case
(child a
licensee).

(f) Cf. Scrutton, L.J., in *Liddle v. Yorks (North Riding) C. C.*, [1934] 2 K. B. 110—111.

(g) [1909] A. C. 229. The facts there stated must be supplemented from the report of the case in the lower Courts; [1908] 2 Ir. R. 242.

(h) Some of the criticism ignored the fact that, while the House of Lords held that there was sufficient evidence to go to the jury, they did not indicate that they would have reached the same conclusion as the jury did.

(i) Lord Atkinson in *Glasgow Corporation v. Taylor*, [1922] 1 A. C. 44, 53—55; Lord Shaw (at p. 53) agreed; Lord Hailsham, L.C., in *Addie & Sons v. Dumbreck*, [1929] A. C. 358, 365—367; Hamilton, L.J., in *Latham v. R. Johnson & Nephew, Ltd.*, [1913] 1 K. B. 398, 419; *Liddle v. Yorks (North Riding) C. C.*, [1934] 2 K. B. 101, 111, 118—119, 129—130; *contra*, Greer, L.J., in *Ellis v. Fulham B. C.*, [1938] 1 K. B. 212, 226—227.

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Taylor's Case
(child a
licensee)

Cooke's Case was applied in *Glasgow Corporation v. Taylor* (*k*). A child, aged seven years, died from eating some poisonous berries which he had picked from a shrub in some public gardens under the control of the Glasgow Corporation. The berries looked like cherries or large black currants, and were of a very tempting appearance to children. The shrub, of whose poisonous nature the Corporation were aware, was not properly fenced from the public nor was any warning given of its deadly character. The child was lawfully in the gardens—probably as an invitee, certainly as a licensee (*l*). The House of Lords held that these facts disclosed a good cause of action. The child, of course, did wrong in picking and eating the berries, but the strong temptation to which he succumbed in doing so had been created by the negligence of the Corporation, and this disposed of any allegation of contributory negligence on the part of the child (*m*).

The Addie Case (child a
trespasser).

The next two decisions of the House of Lords dealt with children who were trespassers. The result of them is that if *a child is a trespasser, he cannot recover unless the danger were put there expressly to injure him or unless the defendant knows that it is extremely likely that he will be exposed to grave danger*. In *Addie & Sons, Ltd. v. Dumbreck* (*n*) a boy, aged four years, was killed by being crushed in the terminal wheel of a haulage system belonging to a colliery company. The wheel was dangerous and attractive to children and was in an inadequately fenced field which the company knew to be used by them as a playground. The company's officials at times warned the children out of the field, but their warnings were disregarded. At the time of the accident, the employees who set the wheel in motion were at such a distance from it and in such a position that the wheel was invisible to them. The child had been warned by his father not to go near the field or the wheel. The child was held to be a trespasser and

(*k*) [1922] 1 A. C. 144 (W. Cases, 250).

(*l*) Cf. *Ellis v. Fulham B. C.*, [1938] 1 K. B. 212, where the child was held to be a licensee.

(*m*) The child's presumptive trespass to, and conversion of, the berries were presumably negatived by *volenti non fit injuria* on the part of the Corporation. The question was, of course, neither raised nor of any importance in this case, but it is worth noting that, except where this maxim applies, a child injured in this manner acquires no title to the thing that caused the harm: e.g., if he finds a razor lying about and appropriates it and cuts himself while playing with it, he acquires no property rights in it, whatever may be his remedies for the injury that he has suffered.

(*n*) [1929] A. C. 358 (W. Cases, 257).

the company to be not liable for his death. "There is no duty on a proprietor to fence his land against the world under sanction that, if he does not, those who come over it become licensees. . . . When a proprietor protests and goes on protesting, turning away people when he meets them, as he did here, and giving no countenance in anything that he does to their presence there, then I think that no Court has a right to say that permission must be implied" (o).

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To some extent the facts in *Excelsior Wire Rope Co., Ltd. v. Callan* (p) were similar. Two children were injured by the company's haulage machinery which was upon land used, but not occupied, by the company; they knew that children swarmed upon the land and played round a pulley block, which caused the injury, without interruption except when the haulage machinery was set in motion. This operation occurred about three times a week for three minutes at a time. On the day in question, the employees of the company went to the pulley block to warn off children and then went to a distance and started the machinery without taking the trouble to turn their heads to see whether any children remained. The accident then occurred. The company were held liable. The decision is not really implicated with the law of dangerous structures, for the company were not occupiers. It is based upon the broad principle stated above which applies to adults as well as to children and, as the Court of Appeal held shortly afterwards in *Mourton v. Poulter* (q), even where they are trespassers (r).

The Excelsior Case (child a trespasser).

Can it be said that there is another exception to the rule

Temptation to trespass.

(o) Lord Dunedin, at pp. 372—373. *Hardy v. Central London Ry.*, [1920] 2 K. B. 459, was approved (child injured by a moving staircase from which children had been repeatedly warned away). See, too, *Liddle v. Yorks (North Riding) C. C.*, [1934] 2 K. B. 101; *Breslin v. L. N. E. R.*, [1936] S. C. 816 (a Scottish case). A child is not a trespasser merely because he runs into the highway: *Culkin v. McFie, Ltd.*, [1939] 3 A. E. R. 613.

(p) [1930] A. C. 404 (W. Cases, 260).

(q) [1930] 2 K. B. 183 (W. Cases, 262); *ante*, p. 572.

(r) Understood in this sense there is probably no difficulty in reconciling the *Excelsior Case* with the *Addie Case*; but if other points of distinction must be sought, it should be noted that in the *Excelsior Case* the defendants' servants could have seen the children without moving from where they were (cf. Scrutton, L.J., in *Mourton v. Poulter*, [1930] 2 K. B. 183, 190), and that they acted with such recklessness as to amount to intention (Lord Dunedin in [1930] A. C. at pp. 410—411); see, in this connexion, *Adams v. Naylor*, [1946] A. C. 543, where the H. L. affirmed the decision of the C. A., [1944] K. B. 750, on another ground (statutory "war damage"); for another aspect of *Adams v. Naylor*, see p. 85, *ante*. Cf. W. O. Hart in 47 Law Quarterly Review (1930), 92—97.

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that a trespassing child cannot recover? Suppose that the attractive danger is so close to where the child is permitted to go that it tempts him to go that much farther in order to reach it, does that fact put him in the position of a licensee and not of a trespasser? The answer seems to be "No". but it requires three qualifications: (1) The child ceases to be a trespasser at all if the permission accorded to it to go upon the occupier's land can also be construed as a licence to play with or upon the dangerous object. Such was the case with the turntable in *Cooke's Case* (*supra*). So, too, in *Jewson v. Gatti* (s), the defendant, whose men were engaged in scene-painting in a cellar adjoining the highway, put an inadequate fence round the opening, and a little girl, who was attracted by the painting and leaned against a bar of the fence to watch it, fell into the cellar in consequence of the defect. The defendant was held liable because he had induced, if not invited, the girl to lean against the bar.

(2) The mere fact that the danger is there and has caused the injury may make the defendant liable for some tort not necessarily connected with the occupation of land or of a structure. In *Lynch v. Nurdin* (t), he had left a horse and cart unattended in a public street, the child was injured by playing with it and the defendant was held liable in tort for negligence; for, since his "most blameable carelessness" had tempted the child, he could not reproach it for indulging its natural instinct to amuse itself in the way it did. And in *Harrold v. Watney* (u), where a boy of four years was injured by putting his foot upon a rotten fence bordering the highway, the defendant was held liable for nuisance in leaving the fence in this condition, for the boy's act was just as lawful as that of an adult would have been in leaning against the fence because he was weary or in putting his foot upon it to tie up his bootlace (a). (3) The allurement afforded by a dangerous object may be one of the elements in considering whether leave and licence have been granted to the child, but by itself it certainly will not suffice to establish such

(s) (1886), 2 T. L. R. 441.

(t) (1841), 1 Q. B. 29.

(u) [1898] 2 Q. B. 320.

(a) Distinguished in *Liddle v. Yorks (North Riding) C. C.*, [1934] 2 K. B. 101, where the fence was in good condition and the child was playing on it instead of using it for a purpose incidental to use of the highway.

permission (b). What constitutes an "allurement" depends on the facts of each case, but unless there is actual knowledge of the danger on the part of the defendant, the thing is not an allurement (c).

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Subject to these qualifications, the child remains a trespasser. Thus, to allow him to play on a pile of sleepers near a railway is no licence to him to go on the railway itself by climbing a fence separating the track from the sleepers (d). So, too, in *Hardy v. Central London Ry.* (e) children often ran from the street through a railway booking-hall, which was open to the street, in order to play on a moving staircase belonging to the company. A child who was injured by doing so was held to be a trespasser, for the company had repeatedly warned children off the premises and there was no evidence that they had licensed them to come into the booking-hall, much less to play on the staircase (f). Of course, it would have been possible to keep some official constantly on duty to keep the children away, but that would have been casting an intolerable burden on the company⁷ and would have made occupiers of property insurers of children against all harm (g). It is unhappily true that most of the accidents to children are due to the fact that a large majority of them have no nursemaid and no playground except the streets, but that is

(b) *Warrington, L.J.*, in *Hardy v. Central London Ry.*, [1920] 3 K. B. 459, 470; *Hamilton, L.J.*, in *Latham v. R. Johnson & Nephew, Ltd.*, [1913] 1 K. B. 398, 416; *Greer, L.J.*, in *Liddle v. Yorks (North Riding) C. C.*, [1934] 2 K. B. 101, 118. Cf. *Holmes, J.*, in the American case, *United Zinc, etc., Co. v. Britt* (1922), 258 U. S. 268, 275: "While it is very plain that temptation is not invitation, it may be held that knowingly to establish and expose, unfenced, to children of an age when they follow a bait as mechanically as a fish, something that is certain to attract them, has the legal effect of an invitation to them although not to an adult. But the principle if accepted must be very cautiously applied." This was cited by *Scrutton, L.J.*, in *Liddle's Case* (*supra*), at p. 110.

(c) *Sutton v. Boodle Corporation*, [1947] 1 K. B. 359, 369 (*per Asquith, L.J.*, with whom both his colleagues agreed).

(d) *Jenkins v. G. W. Ry.*, [1912] 1 K. B. 525

(e) [1920] 3 K. B. 459; applied in *Walder v. Hammersmith B.C.*, [1944] 1 A. E. R. 490.

(f) *Liddle v. Yorks (North Riding) C. C.*, [1934] 2 K. B. 101, was still stronger against the child, for the place to which it had strayed from the highway was a properly constructed wall which was not a trap at all. See, too, *Bint v. Lewisham B. C.* (1946), 62 T. L. R. 238.

(g) Cf. *Fairwell, L.J.*, in *Latham's Case*, [1913] 1 K. B. 398, 407; *Scrutton, L.J.*, in *Purkis v. Walthamstow B. C.* (1934), 151 L. T. 30, declined to take the view that a public authority which provides an ordinary form of amusement for a child (e.g., a swing) on a recreation ground is bound to supervise its use. As to straying from the highway, *Holmes, J.*, said in *United Zinc, etc., Co. v. Britt* (1922), 258 U. S. 268, 276, "a road is not an invitation to leave it elsewhere than at its end".

§ 167.

Child's contributory negligence.

no reason why the law should compel an occupier of land to convert himself into the one or his land into the other.

Contributory negligence of the child is no defence where the child is too young to be guilty of it; and if the injury is due to the negligence of its parent or guardian in looking after it, the child may still recover unless this negligence was the decisive cause of the accident. This has long been recognised as the correct view. At one time it was held that the child was "identified" with the negligence of his guardian and therefore had no action (*h*), but this singular method of visiting the sins of the father upon the children received its death-blow in 1888 (*i*), and in 1933 *Oliver v. Birmingham, etc., Omnibus Co., Ltd.* (*j*), drove the last nail in its coffin. A, an infant of four years, was crossing the road in the care of B, his grandfather. In the middle of the road, the defendants' omnibus approached without any warning and consequently startled B, who let go A's hand. It then struck and injured A. The defendants were held liable to A in spite of B's contributory negligence, for the decisive cause of the injury was the defendants' negligence.

The question of the extent of a parent's responsibility for the general care of his child in this connexion has not yet been fully explored. It seems that if the child is little more than a babe and that the accident to it occurs solely through its not being properly looked after, this will disentitle it from recovering. "The duty of preventing babies from trespassing upon a railway line should lie upon their parents, and not upon the railway company" (*k*). Beyond that, one can infer from the cases which have already been cited that the law tacitly takes account of the fact that among the poorer classes even very young children are usually under the charge of nobody of responsible years when they go abroad, and that this, taken by itself, will not deprive them of a remedy (*l*).

(*h*) *Thorogood v. Bryan* (1819), 8 C. B. 115; *Waite v. N. E. Ry.* (1858), E. B. & E. 719, 728.

(*i*) *The Bernina* (1888), 13 App. Cas. 1. Cf. Pollock, *Torts*, 377—380, and an anonymous and undated brochure, *Negligence, Contributory Negligence and Damage Sustained by a Third Party*, Launceston, Tasmania.

(*j*) [1933] 1 K. B. 35.

(*k*) Salmond, *Torts*, 497, cited by Scrutton, L.J., in *Liddle v. Yorks (N. R.) C. Co.*, [1934] 2 K. B. 101, 110—111; see, too, Vaughan Williams, L.J., in *Schofield v. Bolton Corporation* (1910), 26 T. L. R. 230, 231.

(*l*) Scots law, where a parent can recover a *solatium* for the death of his child, has raised some perplexing questions on this point: Lord Sumner in *Glasgow Corporation v. Taylor*, [1922] 1 A. C. 44, 65—67.

If there be no allurement, trap, invitation or dangerous object placed upon the land, the occupier is not liable. Such was the law laid down in *Latham v. R. Johnson & Nephew, Ltd.* (m), where the child was injured by playing on a heap of stones and was held to have no remedy, because it is a normal use of land to deposit stones on it, and they are no more dangerous than cows or donkeys, if indeed as much. What is an allurement or trap must be inferred from the facts of each case. As Hamilton, L.J., said in this case (n), "a trap is a figure of speech, not a formula. It involves the idea of concealment and surprise (o), of an appearance of safety under circumstances cloaking a reality of danger"; and he added, "In some cases the answer may rest with the jury, but it must be matter of law to say whether a given object can be a trap in the double sense of being fascinating and fatal". Hence, the thing which caused the harm may be so innocuous in itself as not to be a trap, or, although it may be a trap to begin with, it may cease to be one because it is reasonably well protected, or because the danger is obvious even to the child injured by it, or because adequate warning has been given to children to keep away from it. Thus there is no inherent danger in a sound, stationary and immobile vehicle, like an unhorsed van, left unattended in the street (p). And unguarded water, natural or artificial, is in the same category according to an *obiter dictum* of Scrutton, L.J., in *Liddle v. Yorks (North Riding) C. C.* (q). In that case there was adequate warning and the risk was obvious. The defendants' workmen, in carrying out a road improvement, had to leave a large quantity of soil temporarily against a new retaining wall. The heap and the wall were near the highway but on land not yet dedicated to the public. The heap formed a slope giving easy access to the top of the wall. Children had always been warned off when the workmen were there. On a Saturday afternoon, after the workmen had left, a boy, aged seven years who had previously been warned off, climbed up the heap, sat on the wall and, in trying to show his companions

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No liability where no allurement.

(m) [1913] 1 K. B. 398, 407.

(n) *Ibid.* 415, 416.

(o) The context requires the insertion of this comma; see the collateral report in 82 L. J. K. B. 255.

(p) *Donovan v. Union Cartage Co., Ltd.*, [1933] 2 K. B. 71, distinguishing *Lynch v. Nurdin* (1841), 1 Q. B. 29 (*ant^e*, p. 580), where there was a horse harnessed to the vehicle.

(q) [1934] 2 K. B. 101, 112.

§ 167. how bees flew, fell backwards and was injured. The defendants were held not liable, for the danger of falling off the wall was obvious to the child, quite apart from the fact that he was a trespasser because he had been forbidden to go there. Scrutton, L.J., scouted the idea that the best way to get a boy to do something mischievous is to tell him not to do it (r).

(r) *Ibid.*

CHAPTER XXIII

DANGEROUS OPERATIONS

§ 168. A notable extension of the sphere of strict liability is its inclusion of what may be called dangerous operations. Talbot, J., stated the principle as follows in *Brooke v. Bool* (a) in 1928 :

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Dangerous operations.

“ If a man does work on or near another’s property which involves danger to that property unless proper care is taken, he is liable to the owners of the property for damage resulting to it from failure to take proper care, and he is equally liable if, instead of doing the work himself, he procures another, whether servant, agent or otherwise, to do it for him.” In this case the defendant, who had let a lock-up shop to the plaintiff, tried to detect the source of a leak of gas in the shop after the plaintiff had left it at the end of the day. The defendant was assisted in his search by one X, who caused an explosion of the gas by trying to discover the source of the leak with a naked light. The defendant was held liable for the consequent damage to the plaintiff’s goods on four different grounds, one of which was that stated above.

Rule stated.

The *dictum* of Talbot, J., put in general terms a rule which had already been applied in one or two specific torts like nuisance, when it takes the form of injuries to the easement of support, or of dangerous interference with the use of the highway : another example was escape of fire (b). We have already traced the history of its aspect in nuisance (c). What the learned Judge did was to take these various threads, which scientifically presented a rather odd appearance in these particular torts, although they were based on sound practical justice, and weave them into something of more general application and of more theoretical symmetry. And in *Honeywill & Stein, Ltd. v. Larkin Bros, etc., Ltd.* (d), the Court of Appeal approved and applied the principle. The plaintiffs

(a) [1928] 2 K. B. 578, 587 (W. Cases, 265).

(b) *Black v. Christchurch Finance Co., Ltd.*, [1894] A. C. 48.

(c) *Ante*, pp. 457—460.

(d) [1934] 1 K. B. 191. Applied in *The Pass of Ballater*, [1942] P. 112, where Langton, J.’s, remarks on the use of “absolute” in the earlier case are entirely correct.

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had procured the defendants as independent contractors to take photographs of X's cinematograph theatre by flashlight. The defendants by their negligence set fire to the theatre. The plaintiffs paid the amount of the damage to X and claimed that the defendants were liable to recoup them. The main question, then, before the Court was whether the plaintiffs were really liable in tort to make the payment which they had made to X; and it was held that they were liable and that therefore the defendants must indemnify them. The Court laid it down that a person who employs an independent contractor to do work which involves special danger to another's premises must take reasonable precautions to see that the work does not cause damage to the premises.

In what
sense strict
liability.

This shows the point in which this tort can be reckoned as one of strict liability. The defendant is answerable not only for his own wrongdoing and that of his servant or agent but also for the default of an independent contractor. The duty is thus pitched higher than that in negligence, but lower than that in *Rylands v. Fletcher* (e), for he is not liable if he has taken reasonable care. It comes as near to the type of duty in the rule in *Indermaur v. Dames* (f) as to any other species of obligation; but the rule in *Indermaur v. Dames* is limited to injuries to the person, while the rule as to dangerous operations is limited to injuries to property (g).

It has been held that arranging for a journey by aeroplane is not setting in motion a dangerous operation (h).

(e) (1868), L. R. 3 H. L. 330; *ante*, Chap. XIX.

(f) (1866), L. R. 1 C. P. 274; 2 C. P. 311; *ante*, § 164.

(g) This, it is submitted, answers the doubt expressed by Scott, L.J., in *Read v. Lyons & Co., Ltd.*, [1945] 1 K. B. 216, 239, as to the existence of "dangerous operations" as an independent tort. The learned L.J. also said (at p. 228): "Our law of torts is concerned not with activities but with acts. It is the act of the defendant which entails liability on him, whether the act be one of commission or omission. It is not to his profession or trade that the eye of the law looks in its search for general rules in the law of torts." But it is respectfully submitted that in assessing the reasonableness of the care that must be taken (where care is a relevant factor) the nature of an activity may be, as it is here, an essential matter in determining whether or not the act of the defendant is tortious.

(h) *Fosbrooke-Hobbes v. Airwork, Ltd.* (1936), 53 T. L. R. 254, 256.

CHAPTER XXIV

INTERFERENCE WITH FREEDOM OF CONTRACT OR OF
BUSINESS

§ 169. Interference with contract.

This may take the shape of interference by a third party with a contract already subsisting between two persons, or of endeavours by a third party to prevent a contract being made between two persons. We must deal with these separately.

(1) *A commits a tort if, without justification, he knowingly interferes with a contract between B and C.*

The modern law as to this is scarcely intelligible without a brief account of its history which is a notable illustration of progress from the idea of status to that of contract. The story begins with the law respecting interference with the relations between master and servant. Not but what there are early examples of meddling with contracts of a more general character such as the sale of goods, but they are few and far between (a). An action lay for enticement of a servant from his master's service and also for knowingly harbouring a servant who had departed from his master in breach of his service. Whether this action sprang from the Common Law or was based on the Statute of Labourers, 1351—1352 (b), is a doubtful matter, but it is one of anti-quarian interest, for by the time of Elizabeth the Courts had unquestionably established such an action, and it still survives although all the earlier legislation, including that of Elizabeth, has long since been repealed (c). In origin it is scarcely accurate to regard it as a remedy for inducing a breach of contract, for the servant's legal position depended upon status much more than upon contract, the idea of which was at that time in a rudimentary condition. In other words, the law attached a number of obligations to his relationship with his master which were quite independent of any consent

§ 169.

Interference
with
contract.

(1) With a
subsisting
contract.
History.

(a) *E.g.*, 48 Selden Society (1931), 130 (A.D. 1290).

(b) 25 Edw. 3, st. 2.

(c) Holdsworth, *History of English Law*, ii, 459—464; iv, 380—387; Clerk & Lindsell, *Torts*, 319—325; Pollock, *Torts*, 182.

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Enticement
of servant

on his part. This policy of the Legislature might be prompted by an appalling epidemic like the Black Death of Edward III's time or by the remarkable economic developments of Elizabeth's reign, but it was always there. We are not very wide of the mediæval turn of thought if we look upon the mediæval servant who had been enticed or harboured as little better than an ox that had strayed or been taken away from its owner (*d*). This proprietary idea, as we have seen, unfortunately infected the law as to injuries done to parental rights over children, and if a child were seduced it was, and still is, the loss of its services that was the gist of the grievance, not the outrage on family rights (*e*).

The rules as to enticing a servant were worked out in some detail by the Courts and some of the decisions on it are quite modern. Thus, the action probably cannot be maintained if the service has ceased to exist; there is nothing unlawful in persuading my servant to leave me at the conclusion of his term of service (*f*), or, if he is a piece-worker, as soon as the job is ended (*g*); but if the servant of X is induced by Y to work for Y, during the servant's spare time, in circumstances which make the work done for Y a breach of the obligation of good faith and fidelity, which is an implied term of the servant's contract with X, Y is liable in tort to X (*h*). No action will lie for harbouring if the service has terminated, as was held in *Forbes v. Cochrane* (*i*) where slaves escaped to a British man-of-war and the commander of the ship was held not liable, for their slavery ended when they got on board. Far less is an action for enticement maintainable where the contract of service is an unlawful one (*j*). The person who entices or harbours is not liable unless he knows of the contract of service, but he commits the tort if, although he was

(*d*) Note, however, that the legislation in general was not unfair to the labourer: Holdsworth, note (*c*), *ante*.

(*e*) *Ante*, § 71.

(*f*) Lord Kenyon, C.J., in *Nichol v. Martyn* (1799), 2 Esp. 732; the case was questioned, but not upon this point, in *Robb v. Green*, [1895] 2 Q. B. 1, 13--15.

(*g*) Lord Mansfield in *Hart v. Aldridge* (1774), 1 Cowp. 54; the Court in *Blake v. Lanyon* (1795), 6 T. R. 221, 222.

(*h*) *Hivac, Ltd. v. Park Royal Scientific Instruments, Ltd.*, [1916] Ch. 169.

(*i*) (1821), 2 B. & C. 448.

(*j*) *De Francesco v. Barnum* (1890), 45 Ch. D. 430.

innocent of that fact at the time that the servant came to him, he becomes aware of it later and persists in retaining him (k).

§ 169.

It became obvious in course of time that the remedies which we have been discussing were too narrow to satisfy modern requirements. The old idea that a servant had a status had weakened to the extent of giving him freedom to contract with whom he pleased, the idea of contract itself as a compartment of the law had become familiar and the old relationship of "master and servant" was an inadequate and derogatory term to apply to highly paid professional services and to cases in which the contract showed no trace of service at all; e.g., the sale of goods. In 1853 a considerable extension of the law was made in *Lumley v. Gye* (l). It was held that the action for enticement was not to be confined to contracts between master and servant but that it applied also to those for rendering professional services; and that the defendant was liable for inducing Johanna Wagner, a famous operatic singer, not to perform her contract with the plaintiff. The good sense of this extension was clear. It was argued that the plaintiff ought to be satisfied with his action for breach of contract against Miss Wagner, but the answer to that was that in many such cases the defaulting party to the contract might be quite incapable of paying all the damage (m). Moreover, it was law in 1853, and still is at the present day, that the measure of damages in tort may in certain circumstances exceed that in contract (n). *Bowen v. Hall* (1881) (o) and later decisions made it clear that inducement to break any contract, whether of personal services or not, is actionable (p).

Extension
in *Lumley*
v. Gye.

Either party to the contract who is prejudiced by the interference of a third party with it can sue, but the latter is not liable if he did not know of the existence of the contract (q); an exception to this rule is that if the relationship interfered with is that of master and servant, knowledge

(k) *Blake v. Lanyon* (1795), 6 T. R. 221; followed in *De Francesco v. Barnum* (1890), 63 L. T. 514, and *Fred. Wilkins, Ltd. v. Weaver*, [1915] 2 Ch. 322.

(l) 2 E. & B. 216 (W. Cases, 268).

(m) *Crompton, J.*, 2 E. & B. 230—231.

(n) *Erle, C.J.*, *ibid.* 234.

(o) 6 Q. B. D. 333.

(p) *Temperton v. Russell*, [1893] 1 Q. B. 715; *Southern Foundries, Ltd. v. Shirlaw*, [1940] A. C. 701.

(q) *British Homophone, Ltd. v. Kunz* (1935), 152 L. T. 589, 592—603; *British Industrial Plastics, Ltd. v. Ferguson* (1940), 162 L. T. 313.

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of the existence of the relationship is not essential to liability (r), except where the interference takes the form of enticement. An example of the rule would be where John persuades Mary to marry him, not knowing that she is already engaged to Peter; here Peter may have an action for breach of promise against Mary, but he has no remedy against John. Again, if the contract is not a valid one, no action will lie for interference with it; e.g., if it is void as being a gaming or wagering transaction (s). If, however, the contract is valid, but unenforceable because it is not put in writing under the Statute of Frauds, it is submitted that interference with it is actionable; for here the action is not brought on the contract, but is in tort against a third party; it is not even an indirect method of enforcing the contract against the other party to the contract (t).

Kind of
interference
immaterial.

So long as there is interference, it is immaterial what form it takes. The crudest kind is physical violence or intimidation, as in *Garret v. Taylor* (u) where the plaintiff had a stone-pit and the defendant was held liable in an action on the case for the loss caused to him by his workmen leaving him in consequence of the defendant's threat to maim them unless they did so. Nor does it matter whether the physical violence which interferes with the contract is intentional or negligent; if I deprive an employer of the services of his workmen by negligently running them down with my car, I am just as much liable to him as if I had done the act deliberately (v).

Mere
meddling
sufficient.

Mere meddling without inducement may amount to interference. In *G. W. K., Ltd. v. Dunlop Rubber Co., Ltd.* (a),

(r) Indeed, in many cases it is unlikely that such knowledge would exist; e.g., where the interference consists in negligent injury to the servant, as in *Admiralty Commissioners v. S.S. Amerika*, [1917] A. C. 38 (*ante*, p. 195); *Att.-Gen. v. Valle-Jones*, [1935] 2 K. B. 209; *Hodson v. Stallebrass* (1840), 11 A. & E. 301. Note that, although the master must allege loss of service, the inference from *Martinez v. Gerber* (1841), 3 M. & G. 88, 91, seems to be that he need not establish a contract of service, provided he can prove damage arising from the interference.

(s) *Joc Lee, Ltd. v. Dalmeny*, [1927] 1 Ch. 300; *Said v. Butt*, [1920] 3 K. B. 497.

(t) It is true that the plaintiff, in suing the third party for interference, may want to give oral evidence of the contract, but it may be inferred from *Scarisbrick v. Parkinson* (1869), 20 L. T. 175 (a case on quasi-contract) that he would be allowed to do so.

(u) (1620), Cro. Jac. 567.

(v) *Att.-Gen. v. Valle-Jones*, [1935] 2 K. B. 209. Cf. 52 Law Quarterly Review (1936), 5—7. The negligence may consist in omission, as well as in an act; *Mankin v. Scala Theatre Co., Ltd.*, [1947] 1 K. B. 257.

(a) (1926), 42 T. L. R. 376, 593. In *Batts Combe Quarry, Ltd. v. Ford*,

the X Co. manufactured cars and contracted with the Y Co. for the supply of tyres for the cars, it being agreed that the X Co. should have tyres of this particular make fitted to all their cars wherever they were exhibited. At an exhibition the defendants secretly removed from the cars of the X Co. the tyres of the Y Co. and substituted tyres of their own manufacture. The defendants were held liable to the X Co. for trespass to their goods, and to the Y Co. for unlawful interference with their contract with the X Co.

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In this tort while proof of damage is necessary, it is sufficient to establish facts from which it may be inferred that some damage must have resulted to the plaintiff (b).

If my servant acting *bona fide* within the scope of his authority, procures or causes me to break a contract which I have made with you, you cannot sue the servant for interference with the contract; for he is my *alter ego* here, and I cannot be sued for inducing myself to break a contract, although I may be liable for breaking the contract. Such is the inference from *Said v. Butt* (c). The plaintiff wished to get a ticket for X's theatre. He knew that X would not sell him one because they had quarrelled. He therefore persuaded a friend to procure him a ticket without disclosing his identity. When the plaintiff presented himself at the theatre, the defendant, who was X's servant and managing director of the theatre, detected the plaintiff and refused to admit him. He sued the defendant for procuring a breach of his contract with X. The action was dismissed because there was no contract, since the identity of the plaintiff was, in the circumstances, material to the formation of the alleged contract; and, alternatively, even if there had been a valid contract, the principle stated above would prevent the action from lying (d). If the servant does not act *bona fide*, presumably he is liable on the ground that he has ceased to be his employer's *alter ego*; it is true that even then he might still be acting in the

Inducement
by servant.

[1943] Ch. 51; [1942] 2 A. E. R. 639 (the fuller report on this point), no doubt there was (as the Court held) no *inducement*, but it is arguable that the defendants interfered with the contract. However, no point was raised with respect to interference, as distinct from *inducement*, nor was the *G. W. K., Ltd.*, case mentioned. See 59 L. Q. R. 106.

(b) *Exchange Telegraph Co., Ltd. v. Gregory & Co.*, [1896] 1 Q. B. 147; *Goldsohl v. Goldman*, [1914] 2 Ch. 603.

(c) [1920] 3 K. B. 497, 506.

(d) Approved by Greer, L.J., in *Scammell, Ltd. v. Hurley*, [1929] 1 K. B. 419, 443; cf. *Scrutton and Sankey, L.J.J.*, at pp. 436, 449.

§ 169.

Defence of
justification.

course of his employment, but we must take it that this curious piece of metaphysics exempts the employer from vicarious responsibility for this particular tort.

• Interference with contract is not tortious if it be justifiable. This is infelicitously expressed by saying that it is only "malicious" interference that is unlawful. That would imply that meddling is objectionable only if it is spiteful, which is certainly not the law, for mere honesty of purpose and absence of ill-will are not a justification (*e*). What constitutes justification is incapable of exact definition and each case must be dealt with on its merits. It has been suggested that regard must be had to the nature of the contract broken, the position of the parties to the contract, the grounds for the breach, the means employed to procure it, the relation of the person procuring it to the person who breaks the contract, and the object of the person procuring the breach (*f*). Decided cases make it clear that if the methods of interference are unlawful, *e.g.*, violence, threats of violence, fraud, there can be no justification (*g*); but that peaceable action in the plain interests of public morality is a defence; *e.g.*, the banning of a film by a licensing authority which, in the judicial exercise of its discretion, it regarded as objectionable and which the plaintiff had contracted to produce at X's theatre (*h*); or the persuasion of theatre proprietors by a theatrical performers' protection society to break their contracts with Y, a theatrical manager, who paid his chorus girls so low a wage that they were induced to supplement it by vice (*i*). Beyond this, it may be fairly assumed that advice honestly given by one who is under a moral duty to give it is a justification, as where a parent persuades his daughter to break off her engagement to marry a man who is profligate or dishonest, or where a medical man advises his patient that it is dangerous for his health to continue work in tropical parts and the patient in consequence throws up a contract of employment there (*k*).

(*e*) *South Wales Miners' Federation v. Glamorgan Coal Co., Ltd.*, [1905] A. C. 239.

(*f*) Rother, L.J., in *Glamorgan Coal Co. v. South Wales Miners' Federation*, [1903] 1 K. B. 545. 574; in affirming the C. A. the House of Lords, [1905] A. C. 239, conceded that justification would negative liability, but declined to discuss any examples of it outside the facts before them.

(*g*) *Quinn v. Leathem*, [1901] A. C. 495; *National Phonograph Co., Ltd. v. Edison Bell, etc., Co., Ltd.*, [1908] 1 Ch. 335.

(*h*) *Stott v. Gamble*, [1916] 2 K. B. 504.

(*i*) *Brimelow v. Casson*, [1924] 1 Ch. 302.

(*k*) As to a "common interest", see *Camden Nominees, Ltd. v. Forcey*,

By the Trade Unions and Trade Disputes Act, 1906 (l), an act done by a person in contemplation or furtherance of a trade dispute (m) shall not be actionable on the ground only that it induces some other person to break a contract of employment, or that it is an interference with the trade, business or employment of some other person, or with the right of some other person to dispose of his capital or labour as he wills.

§ 169.

(2) A commits a tort against C if, by unlawful means, he procures B not to enter into a contract with C, or not to deal with C.

(2) With a contemplated contract.

The law in connexion with this topic is both copious and confused. It is hard to know how to classify the topic itself, for it may well constitute one form of "Unlawful competition" (§ 170, *infra*) (n). Much more serious than this difficulty of classification is the uncertainty of the law itself, for it is probably impossible to reconcile all the *dicta* in three decisions of the House of Lords—*Allen v. Flood*, [1898] A. C. 1; *Quinn v. Leathem*, [1901] A. C. 495, and *Sorrell v. Smith*, [1925] A. C. 700; nor is it entirely clear what the first two of these cases decided (o). Hence the following suggestions with respect to the contents of this tort must be taken as no more than probable inferences.

The unlawful means may consist in physical violence, in threats, in fraud, or in conspiracy. Conspiracy has been considered in Chapter XVII. An old illustration of physical violence is *Tarleton v. M'Gawley* (p). The plaintiff's ship was about to trade with some natives on the coast of Africa when the defendant, a rival trader, fired a cannon at a canoe on which the natives were and killed one of them and thus deterred the others from trading. It was ruled that an action on the case would lie. In *Garret v. Taylor* (q), already cited,

Kinds of unlawful means.

[1940] Ch. 352. For a summary of the American cases on justification, see 62 *Corpus Juris*, 1145—1146, note 79.

(l) 6 Ed. 7, c. 47, s. 3.

(m) For the meaning of "trade dispute", see *Bents Brewery Co., Ltd. v. Hogan*, [1915] 2 A. E. R. 570.

(n) Salmond, *Torts*, Chap. XXI, deals with it under "Intimidation"; Pollock, *Torts*, 252 *seq.*, under "Conspiracy; Intimidation; Procurement of Wrongs".

(o) The problem is well analysed in Kennedy & Finkelman, *Right to Trade* (1933), and in Haslam, *Trade Combinations* (1931).

(p) (1793), 1 Peake N. P. 270.

(q) (1620), Cro. Jac. 567 (*ante*, p. 590).

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Threat of
lawful action
permissible.

there was a similar decision as to threats of violence which frightened away customers.

A threat to effect a purpose which is in itself lawful gives no right of action unless it is to use intrinsically unlawful means. *Sorrell v. Smith and Veitch's Case*, the facts of which were detailed in § 128, *ante*, carry the first part of this proposition. So, too, in *Hodges v. Webb* (r), the defendant a trade union secretary, was held not liable to the plaintiff for telling employers that workmen of that union would not be allowed on a particular job unless the employers discharged the plaintiff (a non-union man); this they did (s). In this connexion some obscurity has arisen because it is much commoner in everyday speech to use words like "threats", "coercion", "intimidation" with an evil meaning rather than a colourless one. Yet even in popular language they are applied to actions which are quite lawful and then they mean no more than putting pressure, perhaps extreme pressure on a person, as where a schoolmaster tells his pupils that he will flog any of them caught out of bounds. In *Hodges v. Webb* (t), Peterson, J., pointed out this ambiguity, and added that everything depended on the nature of the statement by which the pressure was exercised and that the law cannot regard an act differently because it is called a threat or coercion instead of an intimation or warning (u), and the learned Judge held that, in the absence of unlawful conspiracy or combination, a firm or even emphatic statement by A that, unless B whom A is addressing consents to the adoption of a particular course which B can lawfully take, A will do what he is lawfully entitled to do, is not an illegal threat (v).

There seems to be nothing unlawful in causing injury to a member of a trading or professional body by expelling him from that body for a breach of its rules and preventing other members from working with him, provided this action is in accordance with the rules of the body and is done in good faith in the promotion of its interests; after all, this is only one of the conditions on which he became a member of the

(r) [1920] 2 Ch. 70.

(s) Without any breach of contract on their part.

(t) [1920] 2 Ch. at p. 91.

(u) Scrutton, L.J., in *Ware and De Freville v. Motor Trade Association*, [1921] 3 K. B. 40, 69 (in which the C. A. approved *Hodges v. Webb*) deprecated the use of "question-begging epithets, such as 'boycotting', 'ostracism', the 'pillory', 'coercion', and the like".

(v) [1920] 2 Ch. at p. 89.

body, whether by contract or at least with his assent. Hence, a medical man who is expelled from a professional association in this manner and whose practice is greatly damaged in consequence has apparently no legal remedy (*w*).

It seems quite consistent with this that the Court of Appeal in *Hardie & Lane, Ltd. v. Chilton* (*a*) held that a threat by A, a trading association, to put B, one of its members, on a "stop list" (which would prevent B from getting goods from members of the association) unless B paid A a sum of money for having broken a rule of the association, was not a tort. Indeed, the same Court had already decided in *Ware & De Freville, Ltd. v. Motor Trade Association* (*b*) that actually putting even a non-member of such an association on a "stop list" is not a tort. Unfortunately for the clarity of the law the Court of Criminal Appeal had held in *R. v. Denyer* (*c*) two years earlier than *Hardie's Case* that, on similar facts, the conduct of the defendant's agent was demanding money with menaces and without reasonable or probable cause,—a felony punishable with penal servitude for life. The Court of Appeal in *Hardie's Case* disapproved *R. v. Denyer* (*d*), and an embarrassing situation was created; for each of these Courts of Appeal is of co-ordinate jurisdiction and it was small consolation to the members of a trading association to tell them that, although they had committed a felony, they were free from tortious liability. The knot was cut by the House of Lords in *Thorne v. Motor Trade Association* (*e*). They disapproved *R. v. Denyer* and they upheld *Hardie's Case*, but with the qualification that the object of a combination of persons, like the association,² in demanding payment of the fine, as an alternative to putting a person on the stop list, must be to promote or to protect the legitimate business interests of the combination and not merely to injure that person (*f*).

(*w*) The decision of the Judicial Committee of the P. C. on this point in *Thompson v. British Medical Association (N.S.W. Branch)*, [1924] A. C. 764, seems preferable to that of McCardie, J., in *Pratt v. British Medical Association*, [1919] 1 K. B. 241.

(*a*) [1928] 2 K. B. 306.

(*b*) [1921] 3 K. B. 40; approved by the House of Lords in *Sorrell v. Smith*, [1925] A. C. 700.

(*c*) [1926] 2 K. B. 258.

(*d*) See Professor A. L. Goodhart. *Essays in Jurisprudence*, 175—189.

(*e*) [1937] A. C. 797 (W. Cases, 271).

(*f*) If the act had been that of an individual instead of a combination of persons, probably the object of injuring the other person could not have

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*Allen v.
Flood.*

A case which created great controversy as to the relation of "inducement" to "threat" was *Allen v. Flood* (g). The plaintiff's, two shipwrights, were employed by X to do wood-work on a ship on which X had already in employment some ironworkers. The trade union of the ironworkers objected to X's employment of the plaintiffs because they had previously done ironwork on another ship, and Allen, a delegate of the union, informed X of this and told him that unless the plaintiffs were discharged all the ironworkers would be called out or knock off work. X accordingly discharged them in pursuance of a legal right to do so, for under their contract of employment they were liable to be dismissed at any time. They sued Allen. The House of Lords held that Allen had done no unlawful act, used no unlawful means in procuring the shipwrights' discharge and that, however malicious or bad his motive might have been, his conduct was not actionable. In the years immediately succeeding this decision an impression began to form in some quarters that it had set up a distinction between an "inducement" and a "threat", and that an "inducement" by means which were not otherwise unlawful might nevertheless be a tort. But more recent opinion does not favour this elusive theory. It is now beyond doubt that *Allen v. Flood* decided that if an act is lawful, an evil motive in doing it will not make it unlawful (h). There are weighty *dicta* in later cases in the House of Lords that it decided nothing more (i), and, if in fact it went beyond that, nobody can certainly say what else it did. In any event it would be odd to hold that an "inducement" (not otherwise unlawful) by which A prevents B from dealing with C is tortious when a "threat" (which is commonly supposed to be a stronger thing than an "inducement") is, in similar circumstances, unobjectionable in law.

It is often said or implied in judicial *dicta* that the defendant is not liable in this tort unless he has acted "maliciously". But this really means nothing more than "knowingly", and its use is to be eschewed (k).

made an otherwise lawful act unlawful: Lord Wright in *Crofter Harris Tweed Co. v. Veitch*, [1942] A. C. 435, 466. The note in W. Cases, 278—279, must be modified by this later *dictum*. (g) [1898] A. C. 1.

(h) Already settled by the House of Lords in *Bradford (Mayor of) v. Pickles*, [1895] A. C. 587 (W. Cases, 16).

(i) Lord Macnaghten in *Quinn v. Leathem*, [1901] A. C. 495, 508—509; Lord Duncannon in *Sorrell v. Smith*, [1925] A. C. 700, 722.

(k) *Sorrell v. Smith*, [1925] A. C. 700, 714.

§ 170. Unlawful competition and interference with business (l).

§ 170.

Unlawful
competition.

This head pretends to no scientific exactness. Many examples of the torts mentioned in § 169 might serve as illustrations of this section; indeed the law is not yet susceptible of any cast-iron classification.

The first point to make is that trade competition as such is lawful, however ruinous it may be to those who are beaten in it, for it is worth more to the public than it costs to the unsuccessful competitor. One ancient and one modern authority will suffice. In the *Case of Gloucester Grammar School* (1410) (m), the defendant set up a rival school to that of the plaintiffs with such success that they had to reduce their fees for each scholar from 40 pence to 12 pence a quarter. The plaintiffs were held to have no remedy. Hankford, J., said: "*Damnū* may be *absque injuria*, as if I have a mill and my neighbour puts up another mill whereby the profit of my mill is diminished. I shall have no action against him, although I am damaged".

Ajello v. Worsley (n) carried the principle very far. The plaintiffs were manufacturers of pianos. The defendant, a retail dealer, sold these pianos at such a low price that other dealers forsook the plaintiffs because they could not sell the plaintiffs' pianos at the prices advertised by the defendant with any profit to themselves. The plaintiffs then declined to sell to the defendant any more of their pianos. Nevertheless he continued to advertise them for sale even after he had exhausted such stocks as he had. It was held that he was not liable, for he might lawfully sell them at any price he liked or, for that matter, give them away; and, as a man may, by the Sale of Goods Act, 1893 (o), sell goods which he has not yet acquired, he is equally entitled to advertise their sale. Even if the defendant had none of the plaintiffs' goods at the time of advertising them, he might possibly have acquired them at a later date from other sources.

As to combined competition, what one trader may lawfully do a set of traders acting together may also lawfully do.

Combined
competition

(l) The American Restatement of Torts, Chap. 35—38, is very full and instructive on these topics. See, too, Kennedy and Finkelman, *The Right to Trade* (University of Toronto Press, 1933).

(m) Y. B. Hil. 11 Hen. 4, f. 47, pl. 21.

(n) [1898] 1 Ch. 274.

(o) 56 & 57 Vict. c. 71, s. 5.

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This rule and the qualifications of it were explained in Chapter XVII. The most authoritative illustration of the rule is *Mogul Steamship Co., Ltd. v. McGregor, Gow & Co.* (p), where the plaintiffs and defendants were rival shipowners and the defendants were held not liable for driving the plaintiffs out of the China tea carrying trade by taking cargoes at greatly reduced rates. They had merely adopted "the ordinary expedient of sowing one year a crop of apparently unfruitful prices, in order by driving competition away to reap a fuller harvest of profit in the future". The Court had no "right to say to them in respect of their competitive tariffs, 'Thus far shalt thou go and no further'. To attempt to limit English competition in this way would probably be as hopeless an endeavour as the experiment of King Canute" (q).

Forms of
unlawfulness.

The following are the chief forms of unlawful competition or interference with business :—

(1) Freedom
of contract.

(1) *Interference with contract or freedom of contract.*—This is covered by § 169. Of course it is not limited to unlawful competition.

(2) Unlawful
threats.

(2) *A commits a tort against B if he compels B by threats of an unlawful act to adopt a course of conduct which causes damage to B in his trade or business, or perhaps in any lawful pursuit.*

It may be inferred from *Hardie & Lane, Ltd. v. Chilton* (r), that if a threat be unlawful (there it was lawful), B, in such circumstances, would have an action against A if B's trade or business were damaged; and this inference is supported by a *dictum* of Bowen, L.J., in *Mogul Steamship Co. v. McGregor, Gow & Co., Ltd.* (s). It is doubtful whether this extends to damage inflicted on B by such threats otherwise than in his trade or business; e.g., if A threatens to thrash B if he speaks to A's daughter with whom B is on friendly terms, and B accordingly desists and thereby suffers temporal damage. Of course, such conduct may be an assault if the threat is made in A's presence, but it would not be so if it

(p) [1892] A. C. 25.

(q) Bowen, L.J., in the C. A., 23 Q. B. D. 598, 615—616; adopted substantially by Lord Halsbury, L.C., in the H. L., [1892] A. C. at p. 37.

(r) 1928] 2 K. B. 306; *ante*, p. 595.

(s) (1889), 23 Q. B. D. 598; 614. See, too, *Marshall Shipping Co. v. Board of Trade*, [1923] 2 K. B. 343.

were contained in a letter. On principle it ought to be a tort, and Sir John Salmond was of that opinion (t).

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Over two centuries ago, a much wider proposition than the modest one put forward above was stated by Holt, C.J., in *Keeble v. Hickeringill* (u): "Where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood; there an action lies in all cases"; and the defendant was held liable upon this principle for intentionally discharging guns near the decoy pond of the plaintiff and thereby scaring away the wild-fowl resorting to it. The actual decision was sound enough but it might have been placed equally well upon the ground of nuisance. In 1809 the *dictum* of Holt, C.J., was applied in much less defensible fashion in *Carrington v. Taylor* (a). The defendant had an Admiralty licence to shoot wild-fowl from his boat. He fired his gun at a distance of a quarter of a mile from the plaintiff's decoy and then, at a distance of 200 yards, fired again and shot some wild-fowl as they flew out of the decoy. Nothing appeared as to his intention and he did not fire into the decoy itself. Nevertheless he was held liable. The evidence seems insufficient to have supported an action of any sort, even one for nuisance (b). Some of the noble and learned lords handled the decision so severely in *Allen v. Flood* as to deprive *Carrington v. Taylor* of any authority, and they were of opinion that *Keeble v. Hickeringill* should be regarded as a case of nuisance (c). At the present day, if Holt, C.J.'s *dictum* be interpreted to mean that an act done without lawful justification or excuse, which injures another, is actionable, it is correct; but in so far as it signifies that an evil motive will always convert an otherwise lawful act into an unlawful one, it is unsound (d).

Malicious interference with occupation.

(3) *Slander of title* (e). This is a false and malicious statement about a person, his property, or business which inflicts damage, not necessarily on his personal reputation, but on his title to property, or on his business, or generally on his material interests.

(3) Slander of title.

(t) Torts, § 154 (2), citing Hawkins, J., in *Allen v. Flood*, [1898] A. C. 1, 17.

(u) (1705), 11 East 574, 576

(a) 11 East 571.

(b) In *Hollywood Silver Fox Farm, Ltd. v. Emmett*, [1936] 2 K. B. 468 (*ante*, p. 447), the firing was repeated and deliberate and was held to be a nuisance.

(c) [1898] A. C. 1, 100—104, 132—136, 174.

(d) Cf. Pollock, Torts, 268—269.

(e) For its origin, see Holdsworth, H. E. L., viii, 351—353.

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This tort is as Protean in name as in contents. It has also been styled "trade libel", "slander of goods", "disparagement of quality of goods"; or, alternatively, these have been regarded as the titles of species ranged under the genus, "slander of title" (f). By far the happiest term for it is Sir John Salmond's "Injurious falsehood" (g), for "slander of title" might suggest a connexion with "slander" with which in fact it has scarcely anything in common; and if we adhere to the older phrase it is only because Sir John included under "Injurious falsehood" the other torts of "passing-off" and "injuries to trade marks" to which the term perhaps does not apply quite so exactly (h).

As for classification, slander of title is more closely allied to unlawful competition than to any other heading. Most of the modern cases on it are concerned with rival traders and nearly all the cases, old and new, are instances of interference with business, if not of unlawful competition. But the tort is not entirely confined to these, for in *Shepherd v. Wakeman* (i) the facts were not connected with any wrong to trade. The defendant was held liable in an action upon the case for falsely and maliciously writing a letter to a man who intended to marry the plaintiff stating that the plaintiff was before God his (the defendant's) wife, and thereby the plaintiff lost her marriage. And in *Barrett v. Associated Newspapers, Ltd.* (k), the plaintiff's claim was based on a false assertion by the defendants that the plaintiff's house was haunted. Where the tort does affect business transactions a common form of it is impugning the plaintiff's title to goods; e.g., a false assertion that the defendant has a lien on goods which the plaintiff had bought from X and which X consequently refuses to deliver to the plaintiff (l).

Essentials.

The essentials of the tort are :

(i) Falsity.

(i) *A false statement to some person other than the plaintiff.*—The statement may be oral or written. The tort differs

(f) Salmond, Torts, § 151; Gatlley, Libel and Slander, 163; Clerk & Lindsell, Torts, 791—801.

(g) Torts, *ibid.* The phrase was adopted by Maugham, J., in *Balden v. Shorter*, [1933] Ch 427.

(h) "Falsehood" might imply an intent to deceive, but that is not essential in these torts.

(i) (1662), 1 Sid. 79.

(k) (1907), 23 T. L. R. 666.

(l) *Green v. Button* (1835), 5 L. J. Ex. 81. Cf. *Gutsole v. Mathers* (1836), 1 M. & W. 495; *Malachy v. Soper* (1836), 3 Bing. N. C. 371; *Riding v. Smith* (1876), 1 Ex. D. 91.

from deceit in that the statement is made, not to the plaintiff, but to a third person. It also differs from defamation in that it need not reflect on the plaintiff's personal character (*m*). In *Ratcliffe v. Evans* (*n*) the words imported that the plaintiff had ceased to carry on business. Now there is nothing necessarily discreditable in such an allegation, for it may imply that a man has been so successful in business that he can afford to retire; but, if false, it may, and did in this case, cause considerable damage to the plaintiff who was held to be entitled to recover. If the statement is due to the plaintiff's own fault, he has no claim (*o*).

(ii) *Malice (p)*.—Here "malice" means "wilful and intentional doing of damage without just occasion or excuse" (*pp*). Mere carelessness will not suffice. In *Balden v. Shorter* (*q*), A falsely but carelessly told a prospective customer that the plaintiff, with whom the customer had often dealt while the plaintiff was an employee of A's firm, was still an employee of it and that the plaintiff would therefore get a commission on any order given to the firm by the customer. In fact the plaintiff had at that time left the firm and joined another. The defendant was held not liable. On the other hand, in *Greers, Ltd. v. Pearman & Corder, Ltd.* (*r*), the defendants were held to have acted 'maliciously in alleging falsely that the plaintiffs had infringed their trade mark for chocolates, which included the words "Bouquet Brand"; for the defendants had repeatedly disclaimed any right to the exclusive use of these words years before the plaintiffs had employed them. In such circumstances, the mere fact that the defendants had made such an allegation constituted malice. "Honest belief", said Scrutton, L.J. (*s*), "in an unfounded claim is not malice; but the nature of the unfounded claim may be evidence that there is not an honest belief in it. It may be so unfounded that the particular fact

(*m*) A curious example in which it did is the American case, *Hughes v. Samuels Bros.* (1916), 179 Iowa 1077; Ames & Pound, *Cases on the Law of Torts* (1919), 831.

(*n*) [1892] 2 Q. B. 524 (W. Cases, 279).

(*o*) *Vacha v. Gillett* (1934), 50 Ll. L. Rep. 67, 74—75.

(*p*) Cf. Mr. F. H. Newalk in 60 L. Q. R. 366—377. Unfortunately the learned author carries his examination of the cases no farther than 1874, except for a passing reference to a case of 1922.

(*pp*) Roxburgh, J., in *Joyce v. Motor Surveys, Ltd.*, [1948] W. N. 84.

(*q*) [1933] Ch. 427.

(*r*) (1922), 39 R. P. C. 406.

(*s*) *Ibid.* 417.

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that it is put forward may be evidence that it is not honestly believed.”

(iii) *Damage.*

(iii) *Damage.*—Proof of special damage is required (t), but this requirement is satisfied by proof of a general loss of business where the falsehood in its very nature is intended, or reasonably likely to produce, and actually does produce in the ordinary course of things, such loss; for there are businesses, like those of an auctioneer or a publican, where the customers are often so fleeting in their patronage that it would be almost impossible for the plaintiff to name in particular such of them as have ceased to deal with him in consequence of the defendant's tort (u).

A statement by one trader that his own goods are superior to those of another (mere “puffing”), even if it be false, malicious and cause damage to that other, is not actionable; for Courts of law cannot be converted into advertising agencies for trying the relative merits of rival productions (a).

(4) *Passing off.*

(4) “*Passing off*” goods or business (b).

A commits a tort against B if he passes off his goods or business as those of B.

Moral
innocence
no defence.

It is not necessary for B to prove that A did this knowingly or with any intent to deceive (c); nor that any one was actually deceived—it is enough that deception was probable; nor that he suffered damage (d). Thus the law might appear to be overweighted in B's favour, especially in the point of A's moral innocence being no defence. The explanation seems to be this. At Common Law the action was not maintainable unless there had been fraud on A's part. In Equity, however, Lord Cottenham, L.C., in *Millington v. Fox* (1838) (e) held that it was immaterial whether the defendant had been fraudulent or not in using the plaintiff's trade mark

(t) *White v. Mellin*, [1895] A. C. 154; *Royal Baking Powder Co. v. Wright & Co.* (1900), 18 R. P. C. 95, 99.

(u) *Ratcliffe v. Evans*, [1892] 2 Q. B. 524, 533 (W. Cases, 279); *Leatham v. Rank* (1912), 57 S. J. 111; *Hargrave v. Le Breton* (1769), 4 Burr. 2422; *Evans v. Harries* (1856), 1 H. & N. 251; *Worsley & Co., Ltd. v. Cooper*, [1939] 1 A. E. R. 290; Kerly, *Trade Marks*, 652.

(a) *White v. Mellin*, [1895] A. C. 154, 164–165; *Hubbuck & Sons, Ltd. v. Wilkinson*, [1899] 1 Q. B. 86.

(b) Kerly, *Trade Marks* (6th ed. 1927), Chap. XVI, is the most valuable work on this. See, too, Pearce, *Passing Off* (1928).

(c) In *Draper v. Trist, etc., Ltd.* (1939), 56 R. P. C. 429, 441, 443–444, Clauson and Goddard, L.J.J., expressed doubts whether, where damages are claimed, anything in excess of nominal damages can be awarded if no fraud be proved; but see the M.B. at p. 434.

(d) Kerly, *op. cit.*, 548–549, 606, 610.

(e) 3 My. & Cr. 338.

and granted an injunction accordingly. No direct reason was given for this decision, but one may infer from the judgment that the Lord Chancellor regarded the right to a trade mark as a property right; and, whether or not that were the basis of his decision, it formed the first link in a chain of Equity decisions that a right of property exists in a trade mark, although there has been much debate as to its exact nature. The Common Law Courts, however, adhered to their view that fraud was necessary until the Judicature Acts, by fusing Law and Equity, gave the equitable rule the victory (*f*). Now on the "property" hypothesis the rule is intelligible, for in torts of interference with property, like trespass and conversion, moral innocence does not affect liability at all. The next step was to hold that the idea was not limited to trade marks but applied also to trade names, business symbols and business generally. But this extension was not established even in Equity without a struggle, for in *Singer Machine Manufacturers v. Wilson* (*g*), where the plaintiffs' name had become identified with a particular kind of sewing machine, a great Equity Judge, Jessel, M.R., in the Court of first instance, and a strong Court of Appeal were of opinion that fraud must be proved to make the defendant liable, and that it was not shown here because, although the defendant had manufactured and sold "Singer" sewing machines, yet he had put his own trade mark on them and had expressly stated in advertisements that the machines sold by him were manufactured by himself (*h*). The House of Lords reversed this decision on grounds which it is difficult to state concisely, but partly because the name "Singer" was itself a trade mark (*i*), partly because there was no more need to prove fraud in the case of a trade name than in that of a trade mark (*k*). Later decisions, by relying on one or other or both of these grounds, settled the doctrine that fraud need not be proved in passing off of any sort (*l*), although they showed a great deal of hesitation in regarding trade names and the like as the subject of property (*m*).

(*f*) Kerly, *op. cit.*, 4.

(*h*) 2 Ch. D. 434.

(*g*) 3 App. Cas. at p. 391; Lord Cairns, L.C.

(*k*) Lord O'Hagan, *ibid.* 395—396, and perhaps Lord Cairns at p. 391.

(*l*) *Reddaway v. Bentham, etc., Co.*, [1892] 2 Q. B. 639; Lord Halsbury, L.C., in *Cellular Clothing Co. v. Marton*, [1899] A. C. 326, 334—335.

(*m*) Lord Coleridge, C.J., in *Borthwick v. Evening Post* (1888), 37 Ch. D.

(*g*) (1877), 3 App. Cas. 376.

§ 170.

Varieties
of tort.

The remedies of the plaintiff are an action for an injunction and an action either for damages or for an account.

The commonest forms of the tort are imitating the get-up or appearance of the plaintiff's goods, or selling them under the same or a similar name. If the name used by the plaintiff is merely descriptive of his goods, no action lies; if it connotes goods manufactured by the plaintiff, then the defendant is liable. It is a question of evidence whether the word is one or the other. For instance, it has been held that "naphtha soap" means simply soap with naphtha in it and not necessarily soap manufactured by one, Fels (*n*), and that "vacuum cleaner" means simply a cleaner which operates by suction and not necessarily a cleaner manufactured by the British Vacuum Cleaner Company (*o*); and, on the other hand, that "tabloid" as applied to drugs is not merely descriptive of their shape but signifies drugs manufactured by one, Wellcome (*p*). The leading case is *Reddaway v. Banham* (*q*) where it was held that "camel hair belting" which originally signified nothing more than belting made of camel hair had come to signify belting made by the plaintiffs (*r*). A plaintiff undertakes no light burden of proof in trying to convince the Court that a word in common use has become associated with the plaintiff's goods (*s*)—far heavier than in proving imitation of a device used as a trade mark.

Just as it is possible for a word to acquire a particular trade meaning, so it is possible for a word to lose that meaning. Thus, "Harvey's Sauce" may at one time have signified

449, 458; Lord Esher, M.R., in *Turton v. Turton* (1889), 42 Ch. D. 128, 135; Lord Herschell in *Reddaway v. Banham*, [1896] A. C. 199, 209–210; Kekewich, J., in *Sazlekner v. Apollinaris Co.*, [1897] 1 Ch. 893, 903; Buckley, L.J., in *Brinsmead & Sons, Ltd. v. Brinsmead* (1913), 30 R. P. C. 493, 510–511. See, too, Hanbury, *Modern Equity* (4th ed.), 92, 615–619.

(*n*) *Fels v. Hedley & Co., Ltd.* (1903), 21 R. P. C. 91.

(*o*) *British Vacuum Cleaner Co., Ltd. v. New Vacuum Cleaner Co., Ltd.*, [1907] 2 Ch. 312.

(*p*) *Wellcome v. Thompson*, [1904] 1 Ch. 736.

(*q*) [1896] A. C. 199.

(*r*) And in 1931 it was held, upon the facts, that a Belgian manufacturer did not sufficiently distinguish his goods from the plaintiff's by describing them as "Lechat's camel hair belting": *Reddaway & Co., Ltd. v. Hartley*, 48 R. P. C. 283.

(*s*) Kerly, *op. cit.*, 589–590. The burden is lighter if the plaintiff can show that the defendant intended to produce confusion of his wares with those of the plaintiff: *Office Cleaning Services, Ltd. v. Westminster Office Cleaning Association*, [1944] 2 A. E. R. 269, 271 (where the evidence did not establish such an intent; the decision of the C. A. was affirmed by the H. L., [1916] W. N. 21, where the defendants are *Westminster Window & General Cleaners, Ltd.*).

sauce made by Harvey, but whether it did so or not, any one can now manufacture or sell sauce and call it by that name (t). The test is whether the use of the word in question is calculated to deceive the public by giving buyers the impression that they are getting A's wares when in fact they are getting B's. If the mark or description has become so public and in such universal use that nobody can be deluded in this way, it is said to be *publici juris* (u).

§ 170.

Wrongful use of one's name.—As a general rule a person can freely use his own name, or one which he has acquired by reputation, although the use of it inflicts damage on some one else who has the same name (a). It is doubtful how far this is qualified by the law of passing off. It is clear that a fraudulent use of one's own name for trade purposes is unlawful. In *Massam v. Thorley's Cattle Food Co.* (b), Joseph Thorley for many years manufactured and sold "Thorley's Food for Cattle" according to a recipe of which he had the secret. He died and his executors carried on his business. Shortly after his death other persons formed a company, "J. W. Thorley's Cattle Food Company", in which J. W. Thorley, a brother of the deceased, took a 1s. share. He knew the secret of the manufacture and was employed by the company to conduct it. The company thus sold the same article as "Thorley's Food for Cattle". The executors sued the company and it was held that the company were not at liberty to use the name "Thorley's Food for Cattle" unless they took such precautions as would prevent buyers from supposing that the article sold by them was manufactured at the original establishment of Joseph Thorley (c).

Wrongful
use of one's
name.
(i) Fraudu-
lent.

The law as to non-fraudulent use of one's name is much less settled. Perhaps the key to solving the apparent conflict of some of the decisions is that the law has changed somewhat in comparatively recent times. When two persons have the same surname, e.g., John Smith and Peter Smith, and John accuses Peter of passing off his goods or business as those of John simply because Peter describes them as "Smith's" this,

(ii) Non-
fraudulent.

(t) *Lazenby v. White* (1871), 41 L. J. Ch. 354.

(u) Mellish, L.J., in *Ford v. Foster* (1872), L. R. 7 Ch. 611. 628.

(a) *Jays, Ltd. v. Jacobi*, [1933] Ch. 411; Kerly, *op. cit.*, 616 *seq.* As to the use of a title of honour, see *Cowley v. Cowley*, [1901] A. C. 450.

(b) (1880), 14 Ch. D. 748.

(c) *Croft v. Day* (1843), 7 Beav. 84, was an ingenious fraud of the same sort.

 § 170.

that or the other, the opposing arguments may be put in this way. Peter says, "As my name is Smith and I have only just come to know of your existence or business, why cannot I carry on my business under the name of Smith even if you happen to be named Smith also?" John's retort is, "Use your own name by all means, but don't do it in such a way as to give people the impression that it is my business, which was established and well known long before your business came into existence. It is no great hardship that you must qualify the use of your name to that extent, but it would be a great hardship to me that I should lose my customers because you will not do so". Now, taking the authorities as a whole, the earlier ones show a tendency to favour the first view (*d*), but the more recent incline to the second view (*e*), and it is submitted that this is the current view and that even as to honest passing off there is no difference between use of a man's own name and any other apparently descriptive word. In *Cash, Ltd. v. Cash* (*f*), the plaintiffs carried on trade in frillings. The defendant, who had the same name, commenced also to sell frillings. It was not proved that he did this fraudulently, but Kekewich, J., restrained him by injunction from using his name at all in connexion with such a business. The Court of Appeal, however, pointed out that there had never yet been a decision restraining a person from carrying on a particular trade in his own name and they modified the injunction to restraining the defendant from using his own name descriptively in connexion with his business and frilling *without taking reasonable precautions to distinguish them from those of the plaintiffs*. And it is unlikely that the Courts will make even a qualified order of this sort except in the rare cases where a personal name has become so much identified with a well-known business as to be necessarily deceptive when used without qualification by any one else in the same trade (*g*).

Garnish-
ing "one's
name.

So far we have spoken of use of one's name without any variation of it. If there is an alteration of it which is likely to mislead—"garnishing" of it, as the expression is,—that

(*d*) *E.g.*, *Turton v. Turton* (1889), 42 Ch. D. 128.

(*e*) See especially Buckley, L.J., in *Brinsmead & Sons, Ltd. v. Brinsmead* (1913). 30 R. P. C. 493, 506—512, and the careful analysis of the whole topic in Kerly, *op. cit.*, 616—634. Cf. Salmond, *Torts*, § 152 (8); Hanbury, *Modern Equity* (4th ed.), 615—621.

(*f*) (1902), 19 R. P. C. 181.

(*g*) Kerly, *op. cit.*, 617. See also Mr. R. P. F. Roberts in 78 S. J. 575—576.

is unlawful; thus a firm of wine-merchants, "Short's, Ltd.", obtained an injunction against one, Short, who set up a similar business and styled it "Short's" (h). § 170.

Unauthorised use of another's name (which is not also the user's name) is, of course, unlawful in so far as it falls within the law of passing off, *i.e.*, representing B's goods or business to be the user's goods or business; and this also applies to cases where the defendant uses a fancy name adopted by the plaintiff (i). But, apart from this, there is a rather wider rule that an injunction can be obtained to prevent A from using B's name in a way calculated to injure B in his property, business or profession (j). Provided the tendency to injure is proved, this will enable a medical man to prevent unauthorised use of his name to puff a quack medicine. In nearly all the cases, the defendant's use of the name was fraudulent or at least intentional, but there is some ground for thinking that mere accidental user would also be restrained (k).

Use of
another's
name.

A somewhat similar question arises when A assumes some style or title to which he has no right; *e.g.*, if he tacks to his name in public "B.A., Cantab." when he holds no such degree. The balance of authority favours the view that an injunction against such use is procurable by the body which has power to confer the title when it is likely to deceive the public in their business dealings with the delinquent; much more if it actually does deceive some member of the public. Thus an injunction was obtained by the Royal Institute of British Architects against one who falsely described himself as "A.R.I.B.A." (l). But the unwarranted assumption of

Assumption
of title.

(h) *Short's, Ltd. v. Short* (1914), 31 R. P. C. 294. Perhaps *Heppells, Ltd. v. Eppels, Ltd.* (1928), 46 R. P. C. 96, is explicable on this ground.

(i) *McCulloch v. Lewis A. May, Ltd.*, [1947] 2 A. E. R. 845, where the plaintiff used the fancy name, "Uncle Mac", but the defendants were held not liable for passing off, because their use of the name was totally unconnected with any proprietary right of the plaintiff. Cf. *Hines v. Winnick*, [1947] Ch. 708; *Marengo v. Daily Sketch & Sunday Graphic, Ltd.*, [1948] 1 A. E. R. 406.

(j) *Smith and Williams, L.Js.*, in *Dockrell v. Dongall* (1899), 80 L. T. 556, 557, 558; *Byrne, J.*, in *Walter v. Ashton*, [1902] 2 Ch. 282, 293; *Clark v. Freeman* (1848), 11 Beav. 112, which is the other way, has been repeatedly disapproved.

(k) *Ransom v. Od Chem Co.* (1896), 40 S. J. 846. See also, 176 L. T. 343—344.

(l) *Royal Institute of British Architects v. Hindle* (1925), 69 S. J. 367. See, too, *Institute of Chartered Accountants v. Hardwick* (1919), 35 T. L. R. 342; *Society of Accountants v. Goodway*, [1907] 1 Ch. 489. In *Society of Architects v. Kendrick* (1910), 102 L. T. 526, *Joyce, J.*, refused an injunction,

§ 170.

some distinction which is unlikely to prejudice any reasonable person in his business dealings with the assumer is probably no tort; *e.g.*, wearing the tie of a famous school or club by one who is not a member (*m*). Statutory regulations may, however, make such conduct an offence; *e.g.*, the unauthorised assumption of military decorations (*n*).

Change of name.

Apart from passing off, the law as to change of one's own name is not entirely free from doubt. There are conflicting opinions as to the mode of changing a Christian name, although there is no actual decision on the point (*o*), and there is some uncertainty as to change of surname. The topic is only of indirect interest in the law of tort, and it is enough to say that there seems to be no restriction on change of surname, provided it is not made for fraudulent purposes. No special formality is requisite; proof that the name has been changed by "repute" will suffice and the cheapest and most convenient way of establishing such repute is by way of advertisement in the newspapers. But until the person who makes the change has established such repute, no one else can be compelled to accept the alteration for business or any other purposes. This is probably the law on the argument *ab inconvenienti* if for no other reason. For it would be unreasonable that any one should be permitted suddenly and on his bare assertion to thrust upon other persons legal recognition of a new name when they have been in the habit of dealing with him under another. Nothing but confusion and embarrassment would be thus inflicted on officials concerned with the Parliamentary and municipal franchise or with tradesmen in the payment of debts and in other transactions (*p*).

There can be no action for passing off where (i) there is no interference with another person's trade, and (ii) there is no intent to injure or to deceive. If harm is suffered in such

but he regarded the letters "M.S.A." as meaningless to any one except the plaintiffs and their counsel. The wrong might be slander of title, but it might be difficult to prove damage.

(*m*) As to titles of honour, see *Cowley v. Cowley*, [1901] A. C. 450.

(*n*) Halsbury's Statutes of England, XVII, 216.

(*o*) The variant views may be thus summarised: (1) No change can be made except by Act of Parliament; (2) A baptismal name may be changed at confirmation, but not otherwise; (3) There is no restriction at all on change: Linell, *Law of Names* (1938), 4—11; Fox-Davies and Carlyon-Bellairs, *Law Concerning Names* (1906), 4, 12; 23 Laws of England (Halsbury, 2nd ed.), § 811.

(*p*) 23 Laws of England (Halsbury, 2nd ed.), §§ 810—822; Fox-Davies, *op. cit.*, 47.

circumstances, it is *damnum absque injuria*, however much trouble and inconvenience it may cause. In *Day v. Brownrigg* (q), X's house had for sixty years been called "Ashford Lodge". The house of Y, his neighbour, had been called "Ashford Villa" for forty years. Y changed its name to "Ashford Lodge" and this caused much inconvenience and annoyance to X, who claimed an injunction to restrain Y from such alteration of the name. He made no allegation of malice, nor of intent to injure on Y's part, nor of slander of title. The injunction was refused. After all, it was open to the plaintiff to distinguish his house from the defendant's by styling it "Old Ashford Lodge", "Ashford Hall", "Ashford Castle" or any other title he liked. This decision was followed in *Street v. Union Bank of Spain* (r). The plaintiffs were Street & Co. of Cornhill, advertising agents, and they had for many years used "Street, London", as their address for telegrams from abroad. The defendants, a bank, adopted "Street, London", as their telegraphic address. It was held that they could not be restrained by injunction from doing so. They had no intent to injure the plaintiffs and their own occupation was so different from that of the plaintiffs that it was impossible for them to deflect business from the plaintiffs to themselves.

We have said nothing in this chapter of the legislation relating to infringement of trade marks, patents and copyright. It is of great importance but is foreign to what is primarily an exposition of the Common Law, and its details must be sought in treatises on these topics (s). The statutory remedies for infringement of a trade mark do not exclude those at Common Law.

(q) (1878), 10 Ch. D. 294.

(r) (1886), 30 Ch. D. 156.

(s) Kerly, *op. cit.*; Terrell, *Patents* (8th ed. 1934); Copinger, *Law of Copyright* (7th ed. 1936).

CHAPTER XXV.

ABUSE OF LEGAL PROCEDURE (a)

§ 171.

Malicious
prosecution.
History

§ 171. Malicious Prosecution (b).

The history of this tort takes us back to the old writ of conspiracy which was in existence as early as Edward I's reign and was probably of statutory origin. It was aimed against combinations to abuse legal procedure and it fell into decay in the sixteenth century partly because of its narrow limitation to abuse by two or more persons and partly because the writ of maintenance supplanted it. Even then there was room for another remedy, for maintenance, although it applied to officious meddling in civil litigation, probably did not extend to malicious institution of criminal proceedings (c). This gap was filled by an action upon the case in the nature of conspiracy. It was not very accurately named, for it lay against a single person as well as against those who acted in combination. Its beginnings are somewhat obscure, but it was coming into use in Elizabeth's reign (d) and eventually became known as the action for malicious prosecution. Its progress was gradual, for it had to make its way between two competing principles,—the freedom of action that every man should have in bringing criminals to justice and the necessity for checking lying accusations of innocent people. For some time the Judges oscillated between apprehension of scaring off a just accuser and fear of encouraging a false one; but *Savile v. Roberts* (1698) (e) put the action on a firm basis and indeed it is so much hedged about with restrictions and the burden of proof upon the plaintiff is so heavy that no honest prosecutor is ever likely to be deterred by it from doing his duty. It is notable how rarely an action is brought at all, much less a successful one, for this tort. Holt, C.J.,

(a) The law and its history are detailed in Winfield, *History of Conspiracy and Abuse of Legal Procedure* (1921), and *Present Law of Abuse of Legal Procedure* (1921). See, too, H. Stephen, *Malicious Prosecution* (1888).

(b) Winfield, *Present Law*, etc., Chap. VI.

(c) Winfield, *History*, etc., 136; *Present Law*, etc., 4—6.

(d) Coke thought *Jerom v. Knight* (1587), 1 Leon. 107, was the first instance of it, but *Fuller v. Cook* (1584), 3 Leon. 100, is earlier: Winfield, *History*, etc., 118 *seq.*

(e) 1 *Ld. Raym.* 374.

in *Savile v. Roberts* classified damages as of three kinds, any one of which might ground this action; malicious prosecution might damage a man's fame, or the safety of his person, or the security of his property by reason of his expense in repelling an unjust charge. The remedy thus rests upon the three plinths upon which English law has been built—reputation, personal security and security of property. §§ 171, 172.

The plaintiff must prove (1) that the defendant prosecuted him; and (2) that the prosecution ended in the plaintiff's favour; and (3) that the prosecution lacked reasonable and probable cause; and (4) that the defendant acted maliciously. We can take these point by point.

§ 172. *Prosecution*.—A prosecutor has been described as “a man actively instrumental in putting the law in force” (f). This, of course, refers to criminal, not civil, proceedings. But, even so, it is too wide, for it would include false imprisonment, a tort which we have already sharply distinguished from malicious prosecution, (g); moreover, it is too vague to be of much assistance. “Active instrumentality” is easier to illustrate than to define. If I merely tell a policeman that I have had a particular thing stolen from me and that it was last seen in X's possession, and the policeman without any further instruction on my part makes inquiries and arrests X, it is not I who have instituted the prosecution. I certainly set a stone rolling, but it was a stone of suspicion only (h). Similarly, if a man does no more than tell the story of his loss to a judicial officer, such as a magistrate, leaving him to determine whether the facts amount to a felony, he does not maliciously procure the magistrate to issue his warrant for arrest. Much less can perversion of such a story by the clerk who frames the warrant into a charge of felony

Essentials.
(1) Prosecution.

(f) Lopes, J., in *Danby v. Beardsley* (1880), 43 L. T. 603. The American Restatement of Torts, § 654, gives a more exact test. In *Mohammed Amin v. Jagendra Kumar Bannerjee*, [1917] A. C. 322, the Judicial Committee held that in malicious prosecution the test is not whether criminal proceedings have reached a stage at which they may be correctly described as a “prosecution”, but whether they have reached a stage at which damage to the plaintiff results. No English authority was cited for this meaning of “prosecution”, and, in the case itself, an Indian magistrate had taken cognizance of the complaint by the defendant that an offence had been committed by the plaintiff; and the Judicial Committee held that an action for malicious prosecution would lie. It is difficult to see why the proceedings could not “correctly be described as a prosecution”.

(g) *Ante*, p. 223.

(h) *Danby v. Beardsley* (1880), 43 L. T. 603.

§ 172.

be imputed to the complainant (i). But where the story told is known by the teller to be false, the Judicial Committee have held in an Indian appeal that the teller is liable (k). The peculiar frequency of such lying charges in India was a special ground for this decision, but its general reasonableness adds to its persuasive authority here. So, too, if A goes before a magistrate and positively asserts (whether on oath or not, and whether orally or in writing) that he suspects B of having committed a crime, and the magistrate thereupon issues a warrant for B's arrest, A has commenced a prosecution, for he has done much more than give a mere narration of facts from which the magistrate may or may not infer that B has committed a crime (l).

Binding over
to prosecute.

When the magistrates have had a preliminary hearing of a charge and have decided to send the case for trial to Quarter Sessions or Assizes, they may bind over the accuser to prosecute. As he cannot refuse to be bound over, can it be said that he has instituted the prosecution? No categorical answer to this is possible, for it depends on circumstances. If binding over is a natural consequence of the accusation which any reasonable man would have foreseen, then he has started the prosecution. *Fitzjohn v. Mackinder* (m) was a strong illustration of this. M sued F for a debt. F claimed a set-off in answer to which M produced his ledger containing an acknowledgment signed (as M falsely swore) by F. F denied the signature and alleged it to be a forgery. The Judge, induced partly by M's perjured statement, partly by F's conduct in Court which he regarded as amounting to perjury, committed F for trial for perjury and bound over M to prosecute. F was acquitted and he sued M for malicious prosecution. The action was held to be maintainable. M had set the law in motion because the act of the Court in binding M over was a natural consequence of M's perjury, although his motive in committing it was to get a debt paid and not to prosecute F for any crime (n).

(i) *Cohen v. Morgan* (1825), 6 D. & R. 9; *Leigh v. Webb* (1800), 3 Esp. 164.

(k) *Pandit Gaya Parshad Tewari v. Sardar Bhagat Singh* (1908), 24 T. L. R. 884.

(l) *Elsce v. Smith* (1822), 1 D. & R. 97; *Davis v. Noak* (1816), 1 Stark. 377; (1817), 6 M. & S. 29 (sub tit. *Davis v. Noake*); *Clarke v. Postan* (1834), 6 C. & P. 423; *Dawson v. Vasandean* (1863), 11 W. R. 516.

(m) (1861), 9 C. B. (n.s.), 505.

(n) Winfield, *Present Law*, etc., 178—179. Other cases are *Mittens v. Foreman* (1888), 58 L. J. Q. B. 40; *Dubons v. Keats* (1840), 11 Ad. & E. 329.

But in *Browne v. Stradling* (o), where Stradling had been robbed while he was drunk, had merely stated that he had lost his watch and was bound over to prosecute Browne who had been given into custody by some third person, it was held that Stradling was not the prosecutor for the purposes of malicious prosecution. It was entirely against his will that he had been bound over, and he would gladly have avoided a share in proceedings which must have revealed his discreditable condition at the time that he was robbed (p).

Some hundreds of petty offences are punishable on summary conviction. In applying the law of malicious prosecution to these we must bear in mind the principles on which the tort is founded. It is not committed unless it injures a man's reputation, or his personal freedom or his property. Now accusation of some of these crimes certainly satisfies at least one of these alternatives,—a blot upon the accused's reputation; e.g., prosecution of him for deliberately travelling on a tram without having paid his fare; and if the accusation is a false one and the other ingredients of malicious prosecution are present, he can recover damages (q). But a considerable number of petty offences convey no such moral stigma. In *Wiffen v. Bailey* (r), Bailey, an inspector of nuisances, instituted summary proceedings against Wiffen for not complying with a notice to cleanse certain rooms in a house which he occupied. The complaint was dismissed and Wiffen was awarded £5 5s. which represented his costs as between party and party. He sued Bailey for malicious prosecution and recovered £250 damages, but the Court of Appeal reversed this decision. Such an accusation no more affected Wiffen's fair fame than a charge of keeping pigs in an improper place or of letting a dog wander about unmuzzled. Nor was his liberty of person endangered, for, although if the summons had succeeded, a fine might have been imposed and on non-payment of it a warrant of distress might have been issued and, in default of goods to satisfy the distress, imprisonment might have followed, yet the imprisonment would not have been by virtue of the original proceedings. Nor had he

Prosecution
of petty
offence.

(o) (1836), 5 L. J. C. P. 295.

(p) For binding over witnesses, see *Eager v. Dyott* (1831), 5 C. & P. 4; *Clements v. Ohrlly* (1848), 2 C. & K. 686; *Weston v. Beeman* (1857), 27 L. J. Ex. 57.

(q) *Rayson v. South London Tramways Co.*, [1893] 2 Q. B. 304.

(r) [1915] 1 K. B. 600.

§§ 172, 173. suffered any pecuniary damage, for, although his costs as between solicitor and client in defending the prosecution exceeded the £5 5s. costs as between party and party, yet this excess was not damage in the eye of the law (*s*).

(2) Favourable termination.

§ 173. *Favourable termination of the prosecution.*—The plaintiff must show that the prosecution ended in his favour. At one time the law was otherwise and it was immaterial what had been the fate of the accusation (*t*). But this, to say the least of it, was very cavalier treatment of trial by jury, and in *Parker v. Langley* (*u*) it was laid down that no man could say of a prosecution which was still depending that it was false and malicious and that the plaintiff must show what had become of the indictment. But if proceedings did end in his favour, it is of no moment how they did so, whether by a verdict of acquittal, or by discontinuance of the prosecution by leave of the Court (*a*), or by quashing of the indictment for a defect in it (*b*), or because the proceedings were *coram non iudice* (*c*), or by nonsuit (*d*). The effect of a *nolle prosequi* (staying by the Attorney-General of proceedings on an indictment) is open to question. An old case indicates that it is not a sufficient ending of the prosecution because it still leaves the accused liable to be indicted afresh on the same charge (*e*). But this seems inconsistent with the broad interpretation put upon “favourable termination of the prosecution” which signifies, not that the accused has been acquitted, but that he has not been convicted (*f*).

If the plaintiff is convicted of an offence similar to, but less grave than, the offence with which the defendant charged him, the defendant may still be liable for malicious prosecu-

(*s*) See, too, *Byne v. Moore* (1813), 5 Taunt. 187; *Freeman v. Arkell* (1823), 3 D. & R. 669. (*t*) Winfield, *Present Law*, etc., 182–183.

(*u*) (1713), 10 Mod. 145, 209.

(*a*) *Watkins v. Lee* (1839), 5 M. & W. 270.

(*b*) *Jones v. Gwynn* (1712), 10 Mod. 148, 214.

(*c*) *Atwood v. Monger* (1653), Style 378.

(*d*) *Goddard v. Smith* (1704), 1 Salk. 21; 3 Salk. 245; 6 Mod. 261; 11 Mod. 56.

(*e*) *Goddard v. Smith* (last note).

(*f*) The question has been much litigated in America where the Restatement of Torts, § 659, and the balance of the decisions are to the effect that *nolle prosequi* is a sufficient ending of the prosecution: 38 *Corpus Juris*, 444–445; so, too, a decision of the Supreme Court of N.S.W.: *Gilchrist v. Gardner* (1891), 12 N. S. W. Law Rep. 184.

tion of the graver offence if the plaintiff was not convicted of that (g).

§ 173.

Conviction of the plaintiff makes the action inapplicable (h). This rule is open to the criticism that if the conviction were due solely to the ingenuity of the malicious prosecutor in influencing the tribunal, it is grossly unjust to the accused, especially so where he cannot appeal against the conviction. This was exactly what happened in *Basébé v. Matthews* (i), but the Court unanimously held that the plaintiff had no cause of action. Byles, J., thought that if the rule were otherwise every case would have to be retried on its merits, and Montague Smith, J., feared that they would be turning themselves into a Court of Appeal where the Legislature allowed none. With deference, neither of these reasons is satisfactory, for the burden of proof in malicious prosecution is quite heavy enough to prevent convicted persons from employing it profusely as an indirect method of appeal, and although *Basébé v. Matthews* at present represents the law, there are *dicta* of two masters of the Common Law which lend some support to this criticism (k).

Conviction
procured
by fraud.

A reversal of the accused's conviction by a higher tribunal was held in *Reynolds v. Kennedy* (l) to make the action inapplicable. The Court seems to have held that the original condemnation showed that there was foundation for the prosecution and that its reversal did not entitle them to infer malice. But in *Herniman v. Smith* (m), where the Court of Criminal Appeal had quashed a conviction of Herniman in the Court below and Herniman sued Smith for malicious prosecution, no question seems to have been raised either in the Court of Appeal or in the House of Lords as to the effect of upsetting a conviction on appeal. Herniman lost his action on the ground that Smith at the time that he prosecuted Herniman had, on all the facts then before him, reasonable and probable cause for doing so. This appears to

(g) *Boaler v. Holder* (1887), 3 T. L. R. 546.

(h) *Willins v. Fletcher* (1611), 1 Bulst. 185.

(i) (1867), L. R. 2 C. P. 684.

(k) Lord Campbell, C.J., in *Churchill v. Siggers* (1854), 3 E. & B. at p. 937; Willes, J., in *Fitzjohn v. Mackinder* (1860), 8 C. B. (N.S.) at p. 92. However, the reasoning in *Basébé v. Matthews* seems to have commended itself to the C. A. in *Bynoe v. Bank of England*, [1902] 1 K. B. 467.

(l) (1748), 1 Wils. 232 (commented on in *Sutton v. Johnstone* (1786), 1 T. R. at p. 505). The opposite view might be inferred from *Mellor v. Baddeley* (1834), 2 Cr. & M. 675, but the point was not discussed.

(m) [1936] 2 A. E. R. 1377 (C. A.); [1936] A. C. 305 (H. L.).

§§ 173, 174. be a much wiser way of treating the matter than to hold that, if a man has once been convicted, then the isolated fact of the conviction always shows that the prosecutor had reasonable and probable cause; for in truth he may have had none whatever and may have secured the conviction wholly through his own fraud and perjury, and in such circumstances it would be queer law if he were allowed to snatch at the fact of conviction as giving him reasonable and probable cause where he had none before (*n*).

Quashing of the conviction is, however, relevant to the termination of the prosecution in the plaintiff's favour, and, if it were quashed on the ground of fraud or perjury of the defendant, it might be evidence of malice.

(3) Lack of reasonable cause.

§ 174. *Lack of reasonable and probable cause.*—There does not appear to be any distinction between “reasonable” and “probable”. The conjunction of these adjectives is a heritage from the redundancies in which the old pleaders delighted (*o*), and although it has been said that reasonable cause is such as would operate on the mind of a discreet man while probable cause is such as would operate on the mind of a reasonable man (*p*), this does not help us much, for it is difficult to picture a reasonable man who is not discreet. In *Herniman v. Smith*, the Court of Appeal regarded it as settled practice to ask the jury: (i) Did the defendant commence the prosecution without any honest belief of the plaintiff's guilt? and (ii) Did he fail or neglect to take reasonable care to inform himself of the true facts before commencing or proceeding with the prosecution? (*q*). In the same case, the House of Lords defined reasonable and probable cause as “an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man placed in the position of the accuser, to the conclusion

(*n*) It was held in *Delegal v. Highley* (1837), 3 Bing. N. C. 950, 959–960, that facts which came to the knowledge of the prosecutor only after the charge had been made could not be used by him as evidence of reasonable and probable cause.

(*o*) Winfield, *Present Law*, etc., 192.

(*p*) Tindal, C.J., in *Broad v. Ham* (1839), 5 Bing. N. C. 722, 725.

(*q*) Greer, L.J., [1936] 2 A. E. R. 1377, 1381, 1383. Cf. Cave, J., in *Abrath v. N. E. Ry.* (1883), 11 Q. B. D. 440, 442–443; his direction to the jury was approved by the H. L. on appeal: (1886), 11 App. Cas. 247.

that the person charged was probably guilty of the crime imputed" (r). § 174.

In this connexion two peculiarities are noticeable. First, the plaintiff is compelled to undertake a task commonly supposed to be impossible—to prove a negative. Secondly, while the facts are found by the jury, it is the Judge who must decide whether they establish lack of reasonable and probable cause. This splitting of a function which is usually assigned to the jury is firmly established now, although some half-hearted protest was made against it in the House of Lords in 1870 (s).

It is obvious that no definite rule can be laid down for the exercise of judicial discretion in determining this question. If there is an honest belief that the accusation is true, then even though the belief is mistaken, the charge may still be reasonable and probable (t). Nor need the facts upon which the prosecution was founded be such as would be admissible as evidence to establish the guilt of the accused. "The distinction between facts to establish actual guilt and those required to establish a *bona fide* belief in guilt should never be lost sight of in considering such cases" (u). But this does not entitle a man, in making an accusation, to shut his eyes to facts which would make any reasonable person infer that the accused party's conduct was not criminal. If I insist on prosecuting you for stealing my watch which you refuse to give up because you openly claim a lien on it for repairs which you have done to it, I act without reasonable and probable cause. "An assertion of right is not a felony" (a). If the prosecutor were mistaken, not as to facts, but as to law, he acts with reasonable and probable cause if the law upon the point be intricate or uncertain (b). So, too, if he acts in good faith upon an erroneous opinion of

Function
of Judge.

(r) [1938] A. C. 305, 316 (W. Cases, 285—286).

(s) *Lister v. Perryman* (1870), L. R. 4 H. L. 521.

(t) *Hicks v. Faulkner* (1878), 8 Q. B. D. 167; *Bradshaw v. Waterlow & Sons, Ltd.*, [1915] 3 K. B. 527.

(u) *Hicks v. Faulkner* (1878), 8 Q. B. D. 167, 173.

(a) *Huntley v. Simson* (1857), 2 H. & N. 600, 604; *James v. Phelps* (1840), 11 A. & E. 483. For the effect of new facts coming to the accuser's knowledge after the prosecution has started, see Winfield, *Present Law*, etc., 194—195.

(b) *Phillips v. Naylor* (1859), 4 H. & N. 555, 568, is preferable on this point to the sweeping dictum of Bramwell, B., in *Johnson v. Emerson* (1871), L. R. 6 Ex. 329, 365.

§§ 174. 175. counsel as to the probability of the accused's guilt, provided the facts were fairly laid before counsel (c).

If there be several charges in an indictment, the rule as to reasonable and probable cause applies to all of them (d).

(4) Malice.

§ 175. *Malice*.—Judicial attempts to define malice have not been completely successful. "Some other motive than a desire to bring to justice a person whom he [the accuser] honestly believes to be guilty" (e) seems to overlook the fact that motives are often mixed. Moreover, anger is not malice; indeed, it is one of the motives on which the law relies in order to secure the prosecution of criminals (f), and yet anger is much more akin to revenge than to any desire to uphold the law. Perhaps we are nearer the mark if we suggest that malice exists unless the predominant wish of the accuser is to vindicate the law (g). The question of its existence is one for the jury (h) and the burden of proving it is on the plaintiff (i).

Examples of malice are concocting a charge against a person of being a rogue and vagabond in order to make his children chargeable on the parish (k), or prosecuting a person for theft, not because you believe him to be guilty, but in order to deter other people from committing depredations on your property (l).

At one time malice was not always kept distinct from lack of reasonable and probable cause (m), but a cogent reason for separating them is that, however spiteful an accusation may be, the personal feelings of the accuser are really irrelevant to its probable truth. The probability or improbability of X having stolen my purse remains the same however much

(c) *Bayley, J.*, in *Ravena v. Macintosh* (1824), 2 B. & C. 693, 697; *Hewlett v. Cruchley* (1813), 5 Taunt. 277; *Abrath v. N. E. Ry.* (1883), 11 Q. B. D. 440, 454—455; (1886), 11 App. Cas. 247, 249 (W. Cases, 283); *Bradshaw v. Watclow & Sons, Ltd.*, [1915] 3 K. B. 527.

(d) *Reed v. Taylor* (1812), 4 Taunt. 616. In *Delisser v. Towne* (1841), 1 Q. B. 333, 339 n., Lord Denman, C.J., thought that *Johnstone v. Sutton* (1786), 1 T. R. 493, conflicted with *Reed v. Taylor*, but he declined to give any opinion on the doctrine of either.

(e) *Cave, J.*, in *Brown v. Hawkes*, [1891] 2 Q. B. 718, 723.

(f) [1891] 2 Q. B. 722.

(g) Cf. *H. Stephen*, *Malicious Prosecution* (1888), 37.

(h) *Mitchell v. Jenkins* (1833), 5 B. & Ad. 588; *Hicks v. Faulkner* (1878), 8 Q. B. D. 167, 175.

(i) *Abrath v. N. E. Ry.* (1886), 11 App. Cas. 247 (W. Cases, 283).

(k) *Heath v. Heape* (1856), 1 H. & N. 478.

(l) *Stevens v. Midland Counties Ry.* (1854), 10 Ex. 352, 356.

(m) *Winfield*, *Present Law*, etc., 189.

I may dislike X. And it has long been law that malice and lack of reasonable and probable cause must be separately proved. Malice may, however, be inferred from want of probable cause, but it does not follow that malice alone will always suffice to establish it (n). §§ 175, 176.

§ 176. Malicious civil proceedings.

Malicious
civil
proceedings.

Historically, there was no reason why the old action upon the case for conspiracy should not be extended to malicious civil proceedings as well as to malicious criminal proceedings (o), and it was in fact held to apply (*inter alia*) to malicious procurement of excommunication by an ecclesiastical Court (p), to bringing a second writ of *fi. fa.* against a man when one had already been obtained (q) and perhaps to malicious arrest of a ship (r). In more modern times it has been laid down that it is available whenever the civil proceedings attack a man's credit in scandalous fashion; e.g., malicious bankruptcy proceedings against him, or malicious winding up proceedings against a company (s); and the same requisites must be satisfied as in the action for malicious prosecution.

But does the law go still farther and make the malicious institution of *any* civil proceeding actionable? There is no historical reason why it should not, and it would seem curious to say that a man shall have an action for maliciously taking bankruptcy proceedings against him, but not for maliciously suing him for some scandalous tort like seduction or deceit. However, there is no reported decision in favour of any such general proposition. In *Corbett v. Burge* (t) a debtor who had been sued for a debt which he had already paid was unsuccessful in an action against the creditor for maliciously causing judgment to be entered against him, because he could not prove any malice on the part of the creditor; but it is impossible to make out from the report of the case whether he would have been successful if he had proved malice. Apart

(n) *Brown v. Hawkes*, [1891] 2 Q. B. 726; *Johnstone v. Sutton* (1786), 1 T. R. 544, 545; *Mitchell v. Jenkins* (1833), 5 B. & Ad. 588.

(o) Winfield, *Present Law*, etc., 199, 202.

(p) *Hocking v. Matthews* (1670), 1 Vent. 86; *Gray v. Dight* (1677), 2 Show. 144. Cf. *Fisher v. Bristow* (1779), 1 Doug. 215.

(q) *Waterer v. Freeman* (1617), Hob. 205, 266.

(r) *The Walter D. Wallet*, [1893] P. 202. See other cases in Roscoe, *Admiralty Practice* (5th ed. 1931), 267.

(s) *Quartz Hill Gold Mining Co. v. Eyre*, (1883), 11 Q. B. D. 674, 683, 689; *Brown v. Chapman* (1762), 1 W. Bl. 427.

(t) (1932), 48 T. L. R. 626.

§§ 176—178. from this case, it has been urged against the general proposition, first, that the person maliciously sued is adequately compensated by successfully defending the action—which is patently false—and, secondly, that litigation must end somewhere—which is true as a fact but unconvincing as an argument, for litigation should end only where common justice has been done or at least attempted (*u*). However, the Legislature has interfered in outrageous cases of this sort, for litigious monomaniacs can be muzzled under the Supreme Court of Judicature (Consolidation) Act, 1925 (*a*).

Malicious
process.

§ 177. Malicious process.

This signifies, not so much abuse of litigation as abuse of some executive action in connexion with it. Thus an action will lie for maliciously causing the arrest of another person on civil process. Under the old system of procedure an action usually began with the technical arrest of the defendant. Abolition of such arrest has cut most of the ground from under this remedy, but it is still conceivable in a case where, under the Debtors Act, 1869 (*b*), the imprisonment of a debtor has been maliciously procured by his creditor on a false allegation that he is about to abscond. Another example of malicious process is procuring the issue of a search warrant for goods (*c*).

Maintenance
and
champerty.

§ 178. Maintenance and Champerty (*d*).

“Maintenance is where any man gives or delivers to another that is plaintiff or defendant in any action any sum of money or other thing, to maintain his plea, or takes great pains for him when he hath nothing therewith to do” (*e*). Champerty

(*u*) The rules in the American Restatement of Torts, §§ 674—675, are more satisfactory than our law.

(*a*) 15 & 16 Geo. 5, c. 49, s. 51, repealing and virtually re-enacting the Vexatious Actions Act, 1896 (59 & 60 Vict. c. 52). The legislation was needed, for in *Re Chaffers* (1897), 45 W. R. 365, a person had within five years brought forty-eight civil actions against the Speaker of the House of Commons, the Archbishop of Canterbury, the Lord Chancellor and others. Forty-seven of them were unsuccessful.

(*b*) 32 & 33 Vict. c. 62, s. 6.

(*c*) Winfield, Present Law, etc., 203.

(*d*) The history of the law relating to them is treated in Winfield, History of Conspiracy, etc., 131—160; and the present law in Winfield, Present Law of Abuse of Legal Procedure, 1—93; Bodkin, Maintenance and Champerty (1935). See, too, Professor Max Radin in 24 California Law Review (1935), 48—78.

(*e*) *Termes de la Ley*; approved by Lord Coleridge, C.J., in *Bradlaugh v. Newdegate* (1883), 11 Q. B. D. 1, 5. So, too, *Anderson v. Radcliffe* (1858), E. B. & E. 806, 825; *James v. Ker* (1889), 40 Ch. D. 449, 458; *Neville v.*

is "the unlawful maintenance of a suit in consideration of some bargain to have part of the thing in dispute, or some profit out of it" (f). § 178.

Champerty is thus a species of maintenance, and whatever History.
be the historical accuracy of this view it is now firmly rooted in our law. Both were criminal offences at Common Law and, owing to their prevalence, the Common Law had to be fortified by statutes. There was also an action for maintenance at Common Law. The remedies were thus abundant but, until Tudor times, very ineffective. No branch of the law depended more for its efficacy on the uprightness of those who were called upon to enforce it, and unfortunately they were the worst offenders from the highest to the lowest, from the King to the lying "sumpnour" of Chaucer's time who for blackmailing purposes falsely accused people of fornication before the ecclesiastical Courts. The Star Chamber succeeded in suppressing maintenance in its worst form and it survived rather as a pettifogging mode of swindling or annoying a neighbour than as an emblem of baronial power and royal weakness. Cases of it are not very common nowadays. It differs from malicious prosecution in that it applies only to interference with civil proceedings; it is not maintenance to interfere officiously in criminal proceedings, although it may possibly be malicious prosecution (g).

As to what constitutes interference, it is probable that Interference.
something more than a mere promise to maintain is necessary; such an agreement may well be unlawful as a contract, but it is questionable whether it is the tort of maintenance (h); however, it seems fairly certain that it is the tort of conspiracy (i). Giving or lending money, or bearing the whole

London Express Newspaper, Ltd., [1919] A. C. 368, 390, 402 (W. Cases, 286). There is some doubt whether "action" is not too narrow: Winfield, *Present Law*, etc., 4—10.

(f) 1 Hawk. P. C., Chap. 84, sect. 1. F. N. B. 172 A is materially the same.

(g) *Grant v. Thompson* (1895), 72 L. T. 264. Cf. Winfield, *Present Law*, etc., 4—10, for the kinds of civil proceedings in which maintenance is possible.

(h) *Flight v. Leman* (1843), 4 Q. B. 883, indicates that it is not, but there are obiter dicta of Lord Colclridge, C.J., in *Bradlaugh v. Newdegate* (1883), 11 Q. B. D. 1, 8, and Lord Atkinson in *Neville v. London Express Newspaper, Ltd.*, [1919] A. C. 368, 404, the other way. Cf. Winfield, *op. cit.*, 10—14.

(i) Dicta of Viscount Simon, L.C., and Lord Wright in *Crofter Hand-Woven Harris Tweed Co., Ltd. v. Veitch*, [1942] A. C. 435, 447, 478. Maule, J.'s, obiter dictum to the contrary in *Fitz v. Nicholls* (1846), 2 C. B.

§§ 178, 179. or part of the expense of an action is the most natural form of maintenance, but saving a litigant from expenses which he might otherwise incur is equally objectionable (*k*).

Parties. It is immaterial whether it is the plaintiff or the defendant to whom assistance is given, or whether the action maintained was successful or unsuccessful (*l*). If X maintains Y in Y's action against Z, X commits maintenance whether Y wins or loses his action. If it be asked, "What injustice is done to Z if the Court holds him liable to Y in any event?" the answer is that Y may possibly have won his action, not on its real merits, but on a highly technical point of law, or through a perverse verdict, or a judicial misdirection, or an incomplete forensic argument. In other words, Z might have had justice according to law, but not justice.

Not action-
able *per se*.

Maintenance is not actionable *per se*: *Neville v. London Express Newspaper, Ltd.* (*ll*). The plaintiff must prove special damage. If he lost the action maintained, it is something of a puzzle to discover what special damage he can prove. Suppose that A sues B for an alleged debt and that M maintains B in defending the action. Suppose that A loses the action and sues M for maintenance. What special damage can A prove? Not the debt he claimed from B, for *ex vi termini* B never owed it; nor the costs payable to B, for they presumably followed the event in the action, A v. B; nor his own costs, for they were incurred in prosecuting a claim which had no legal existence; nor any possible increase of his costs owing to M's interference, for the House of Lords declined in *Neville's Case* to regard them as sufficient damage (*m*).

Defences.

§ 179. *Defences*.—Maintenance is officious meddling, but what is "officious"? The vagueness of this word has probably saved maintenance from total disappearance in the modern law. Most of the mediæval litigation centred on the

501, 510—511, was unsupported by any analysis on his part of the authorities cited by counsel on this point.

(*k*) 1 Hawk. P. C., Chap. 83, sects. 4—5.

(*l*) *Neville v. London Express Newspaper, Ltd.*, [1919] A. C. 368 (W. Cases, 286).

(*ll*) [1919] A. C. 380.

(*m*) [1919] A. C. 380. Upon this point there was no difference of opinion among the noble and learned Lords. In *Weld-Blundell v. Stephens*, [1920] A. C. 956, 968—969, 970, Viscount Finlay, who was L.C. in *Neville's Case*, suggested two hypothetical examples in which the plaintiff might be able to prove special damage even if he had been unsuccessful in the maintained proceedings; but his judicial brethren did not assent to his examples. Cf. W. Cases, 291—292.

meaning of the adjective and judicial interpretation of it has undergone a revulsion. In Henry VI's reign it looks as if the law presumed that any one committed maintenance who helped a litigant in any way. In our own times this is no longer so, and the Courts for more than a century and a half have so enlarged the limited exceptions of the old law that a plaintiff in an action of maintenance has much less prospect of success (n). The defences at the present day are many and the following list is probably not exhaustive. No general principle underlies them and some of them are so destitute of modern authority that it is impossible to be sure how far they still exist. Such are kinship, contingent or reversionary interest in the subject of the litigation, the relationship of master and servant, friendship and courtesy (o). The most likely way in which the Courts would treat these would be to take into account all the circumstances of the case in preference either to relying on decisions which have often little relation to the England of to-day, or to snatching blindly at catchwords like "kinship", "master and servant", "friendship", without further investigation of what they convey. Other defences on which there is more recent authority deserve more notice.

(1) *Professional legal assistance*.—Counsel and solicitors of course are exempt *virtute officii*, but they may be liable if they go beyond what the law regards as professional assistance. The matter is one of great importance to solicitors in connexion with undertaking litigation on behalf of impecunious clients. They are perfectly entitled to do this if they take pains to discover whether there is a proper cause of action. No doubt the action in such circumstances is *speculative in the sense* that unless the costs of it can be got out of the other party, the solicitor will get none; but that is legitimate, for often a poor man could not get professional assistance otherwise. What is objectionable and unlawful is taking up the case of a poor client irrespective of any probability of success in it and merely in the hope of getting the other party to compromise

(1) *Professional help.*

(n) See *dicta* in the following passages as to the changed view of the law: Buller, J., in *Master v. Miller* (1791), 4 T. R. at p. 340; Best, C.J., in *Williams v. Protheroe* (1829), 3 Y. & J. at p. 135, and 2 M. & P. at p. 786; Lord Abinger, C.B., in *Findon v. Parker* (1843), 11 M. & W. at pp. 679, 682; Lord Coleridge, C.J., in *Bradlaugh v. Newdegate* (1883), 11 Q. B. D. at p. 14; Cozens-Hardy, M.R., in *British Cash, etc., Ltd. v. Lamson & Co., Ltd.*, [1908] 1 K. B. at p. 1012; Viscount Haldane in *Neville's Case*, [1919] A. C. at p. 389; Lord Shaw of Dunfermline, *ibid.* 414.

(o) Winfield, *op. cit.*, 28—44.

§ 179.

the action, and it is only the facts of each particular case that will settle under which category it falls. In *Wiggins v. Lavy* (p), the solicitor agreed with two poor people, X and Y, who had been injured in an accident caused by Z, to assist them in suing Z. X and Y were to pay no costs, but ten per cent. of any damages recovered were to be retained by the solicitor. He threatened Z with proceedings, but did not commence them until eleven months later, nor had he kept any accounts of similar transactions in which he had previously engaged. The Court of Appeal held that these facts showed that he had committed maintenance, but they gave judgment for him on the ground that Z had not proved any special damage (q).

(2) Poverty.*

(2) *Assistance to the poor*.—This is a well-recognised defence, for if the law were otherwise, a poor man, in view of the expense of litigation, would be compelled to endure many injuries rather than spend time and money on an arguable case (r). It is quite possible, however, to abuse this defence and, in that event, an action for maintenance will lie; as where a pauper was made a mere pawn for the purpose of litigation (s).

(3) Assignment of choses in action.

(3) *Assignment of choses in action*.—This defence is cognate to the law of contract rather than to tort (t).

(4) Interest.

(4) *Interest*.—The looseness of this vague general exception has been useful to the Courts in helping them to mould the older law of maintenance to the needs of the modern community; but it also makes it difficult to say where interest ends and officiousness begins.

Whenever persons claim a common interest in the same property by the same title, they may lawfully maintain each other (u). Again, common commercial interest may be

(p) (1928), 44 T. L. R. 721.

(q) For fuller details, see Cordery, *Solicitors* (4th ed. 1935), 341. Note, also, that a policy of insurance taken out by a solicitor against loss arising from his professional mistakes is illegal in so far as it purports to cover loss from a champertous agreement, even though he did not realise that the agreement was champertous when he made it: *Haseldine v. Hosken*, [1933] 1 K. B. 822.

(r) *Harris v. Brisco* (1886), 17 Q. B. D. 504; *Holden v. Thompson*, [1907] 2 K. B. 489.

(s) *Pechell v. Watson* (1841), 8 M. & W. 691.

(t) It is fully considered in Winfield, *op. cit.*, 44—69.

(u) 1 Hawk. P. C., Chap. 83, sect. 18; *Wild v. Hobson* (1813), 2 Ves. & B. 105, 112—113; *Hawkins, J., in Alabaster v. Harness*, [1894] 2 Q. B. 897, 902.

protected in this way. In *British Cash & Parcel Conveyors, Ltd. v. Lamson Service, Ltd.* (a), A and B were rival manufacturers of an apparatus for carrying cash from one part of business premises to another. B obtained contracts for the hire of his apparatus from three persons already under contracts to use A's apparatus; and B agreed to indemnify them against any claim by A for breach of contract against them. Two of these persons had formerly dealt with B, and the third had contracted with A under the impression that he was B. A recovered damages for breach of contract against all these three persons. B paid their damages and costs under the indemnity. A sued B for maintenance. B was held not liable because he had acted in legitimate defence of his business interests.

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Whether common interest includes assistance in litigation given from a sense of public duty is a debatable matter. *Bradlaugh v. Newdegate* (b) shows that mere zeal for the observance of the law will not justify maintenance. Bradlaugh had rendered himself liable to statutory penalties for not taking the oath required of members of Parliament. Newdegate maintained X in suing Bradlaugh for these penalties. The action was unsuccessful and Bradlaugh then sued Newdegate for maintenance. It was held to be no defence that Newdegate's conduct had been prompted by "the interest which all the Queen's subjects have in seeing that the law of the land is respected, and the enactments of every Act of Parliament are obeyed" (c). In *Neville v. London Express Newspaper, Ltd.* (d) the defendants in their newspaper had exposed the plaintiff's fraud and had successfully maintained the victims of his fraud in actions against the plaintiff to recover the property of which he had swindled them. When sued by the plaintiff for maintenance, the defendants pleaded *inter alia* that they had acted on grounds of public duty. The case, in its passage up to and including the House of Lords, was decided on other grounds and no opinion was expressed on this plea except by Lord Haldane, one of the dissentient law lords, who thought that the defendants' conduct was a piece of journalistic enterprise,

(a) [1908] 1 K. B. 1006.

(b) (1883), 11 Q. B. D. 1.

(c) 11 Q. B. D. 13.

(d) [1919] A. C. 368 (W. Cases, 286).

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not disclosing any interest recognised by law. Upon the facts it may possibly have been so, but one can imagine cases in which the Courts might take another view and their tendency is towards widening the defence of "interest". Nor is there anything in either of the cases just narrated which denies the possibility of public duty being in some circumstances a defence.

A purely personal or sentimental interest is no defence. *Alabaster v. Harness* (e) is a leading case on this. Harness was interested in the sale of electrical appliances for the cure of disease. He employed T, an expert, to report on them. T reported favourably. The plaintiffs, who were newspaper proprietors, strongly criticised T's report, the appliances, T's expert qualifications and his conduct and that of Harness in connexion with the whole transaction. T sued the plaintiffs for libel at the instigation of Harness, who supplied the money for the action. T lost the action. The plaintiffs then sued Harness for maintenance. The Court of Appeal held that the action lay because Harness had no common interest with T in the action for libel. It was true that that action might have incidentally affected Harness, but in it his character and conduct could be neither judicially condemned nor justified. His interest in the result of it was sentimental, not legal.

(e) [1895] 1 Q. B. 339; followed in *Oram v. Hutt*, [1914] 1 Ch. 98.

CHAPTER XXVI

MISCELLANEOUS AND DOUBTFUL TORTS

§ 180. This chapter is concerned with three different types of injuries. First, there are some wrongs which are certainly torts, but the details of which are rather outside the scope of an elementary book on that topic; these may be styled "miscellaneous torts". Secondly, there are other injuries which are no doubt unlawful wrongs of some sort, but of which we cannot say with certainty that they are torts; these may be called "doubtful torts". Thirdly, there are some injuries which, if they be unlawful, are torts, but it is doubtful whether they are unlawful at all; these we can call "doubtful wrongs".

§§ 180, 181.

Scope of chapter.

§ 181. Miscellaneous torts.

Miscellaneous torts

The most conspicuous of these is unlawful interference with a franchise. A franchise is a royal privilege, or branch of the King's prerogative, subsisting in the hands of a subject (a). The forms of it are innumerable, but common examples are the franchise of a number of persons to be incorporated and subsist as a body politic, and franchises to have waifs, wrecks, estrays, treasure trove, royal fish, to hold markets and fairs, to take tolls for bridges and ferries (b).

In another sense, "franchise" signifies the right to vote at a parliamentary or municipal election. In the famous case of *Ashby v. White* (c), a returning officer was held liable in damages for wrongfully refusing to take the plaintiff's vote at a parliamentary election (d).

Usurpation of a public office or interference with the discharge of it is a tort against the person rightly entitled to it. The remedy in tort seems to have been almost forgotten

(a) Blackstone, Comm. ii, 37.

(b) Details are given in Clerk & Lindsell, Torts, Chap. XXIII.

(c) (1703); 2 Ld. Raym. 938; 1 Bro. Parl. Cas. 62. The best account of the case for students' purposes is in 1 Smith's *Leading Cases* (13th ed. 1929), 253.

(d) *Tozer v. Child* (1857), 7 E. & B. 377, carries the same point as to municipal elections.

§§ 181, 182. in modern legal literature (*e*) and the last reported English decision on it goes back to 1808 (*f*). The chief reason for its decline was the greater popularity of the quasi-contractual action for money had and received (*g*). The chief characteristics of a "public office" (apart from any statutory definition) are that it is a post the occupation of which involves the discharge of duties towards the community or some section of it, whether the occupier of the post is or is not remunerated (*h*). It is not clear from the authorities whether the defendant can successfully plead an honest but mistaken belief as to his rights, in usurping or interfering with the office (*i*). Damages are probably not limited to the amount of the fees that would have been received but for the usurpation (*k*).

Doubtful
torts.

§ 182. Doubtful torts.

Some unlawful wrongs defy classification and it is difficult even to ascertain what their names are; as to others, it is uncertain whether they are torts, *e.g.*, the wrongs considered in this section. This need not upset any one acquainted with the history of the law of tort. In the family of torts there are well-known torts which were named almost as soon as they were born, *e.g.*, trespass. There are also such as have acquired names somewhat later, *e.g.*, malicious prosecution. Finally, there are some whose parentage is so dubious that they not only lack concise names but are in peril of being thrust out of the family as bastard intruders.

One of these doubtful torts—maliciously causing the retirement of a naval officer—has already been noticed (*l*). Another which deserves fuller mention is

Abuse of
quasi-judicial
powers.

Abuse of quasi-judicial powers.—In many societies authority is given to certain of the members to exercise over

(*e*) Its history and the current law are developed in 56 L. Q. R. (1940), 463—478.

(*f*) *Carrett v. Smallpage*, 9 East 330. A later Irish decision is *Lawlor v. Alton* (1873), 9 Ir. R. C. L. 160.

(*g*) First applied for this purpose in *Woodward v. Aston* (1676), 2 Mod. 95, and not much used (if at all) since 1872. Other remedies are information in the nature of *quo warranto*, mandamus, injunction, action for a declaration. They, too, are not now of common occurrence, perhaps because usurpation of public office has become less easy and profitable than in time past: 56 L. Q. R. 478.

(*h*) 56 L. Q. R. 464—465.

(*i*) *Ibid.* 468—469. It is a defence according to the American Restatement of Torts, § 865.

(*k*) 56 L. Q. R. 469—470.

(*l*) *Fraser v. Balfour* (1918), 87 L. J. K. B. 1116; *ante*, p. 15.

the members at large a jurisdiction resembling that of an inferior Court of justice; e.g., the General Medical Council over practitioners, the Stock Exchange Committee over stock-brokers, the Inns of Court over barristers, the Law Society over solicitors, or any committee of a club over its members. Persons entrusted with these quasi-judicial powers act unlawfully if, in expelling or otherwise penalising a member, they fail to observe the terms of any particular statute, contract or agreement affecting their relationship with him; or, supposing that the instrument creating the society is silent upon the point, if they fail to observe the rules of natural justice. "Natural justice", as Lord Wright observed in his analysis of the term in *General Medical Council v. Spackman* (m), "seems to be used in contrast with any formal or technical rule of law or procedure." The most important application of it to quasi-judicial functions is that a man must not be removed from office or membership, or otherwise dealt with to his disadvantage, without having fair and sufficient notice of the charge against him and being given an opportunity of defending himself (n).

If these conditions are fulfilled, the law Courts will not interfere even if they think that the decision of the quasi-judicial body was wrong; if they are not fulfilled, the proceedings will be declared void and the member will be reinstated and maintained in his rights until the matter has been treated in regular fashion (o). The Courts say in effect: "We shall insist on your observance of your own rules or, if you have none, on the rules of natural justice, but beyond that we shall not go, even if we think that you have made an honest blunder in the application of them. And even if you act dishonestly in such application, or ignore the rules, we are not going to substitute ourselves for you. All that we shall do is to put the injured party back in his original position and leave it to you to exercise your quasi-judicial functions properly." The law could scarcely do otherwise, for if the Courts usurped these functions they would really be making themselves *ex officio* members of every club committee in

(m) [1943] A. C. 627, 640—645. Another good analysis is that of Maughan, J., in *Maclean v. Workers' Union*, [1929] Ch. 602.

(n) "Even God himself", said Fortescue, J., in *Dr. Bentley's Case*, "did not pass sentence upon Adam before he was called upon to make his defence": Campbell, *Lives of the Chief Justices* (1849), ii, 185.

(o) *Fisher v. Keane* (1878), 11 Ch. D. 353.

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England. Moreover, there must always be wide differences between the modes of inquiry employed by domestic tribunals and the methods of trial in the law Courts. Usually counsel do not appear before the domestic tribunal, it cannot administer an oath or compel the parties or witnesses to attend, it is bound by no rules of evidence and it may even be composed of witnesses of the very facts which it is investigating (*p*).

It is possible for the rules of natural justice to be excluded in whole or in part by the statute, contract or agreement affecting the society. Thus, when Dr. Hayman was dismissed from the headmastership of Rugby School in 1873 by the governors, without being given an express opportunity of defending himself, it was held that the regulations under which they had proceeded entitled them to take this course provided they acted (as they did) fairly and honestly in exercising their discretion (*q*); and in *Russell v. Russell* (*r*) partnership articles were so drawn as to give one partner an absolute power to expel the other from the partnership, and the Court held that however capricious the motives for expulsion might be, the aggrieved partner had no remedy (*s*).

Is it really
a tort?

Is abuse of quasi-judicial powers really a tort at all? In practically all the cases that have occurred the rights of the plaintiff depended on a contract or agreement whereby he became a member of the society, and breach of either of these would not necessarily be also a tort. *Weinberger v. Inglis* (*t*) might at first sight be regarded as a case where the duty towards the plaintiff was independent of contract or agreement. He was a member of the Stock Exchange and his grievance was that at the annual election of members he was not re-elected, although normally every member on his first election has a well-founded expectation that he will be re-elected to that body. But the House of Lords, as a whole, left it open whether the committee owed any duty at all to a member seeking re-election and even the noble and

(*p*) *Maclean v. Workers' Union*, [1929] Ch. 602, 623—626. See, too, *General Council of Medical Education v. Spackman*, [1943] A. C. 627.

(*q*) *Hayman v. Governors of Rugby School* (1874), L. R. 18 Eq. 28.

(*r*) (1880), 14 Ch. D. 471.

(*s*) There is a wealth of authority on the topic. Most of the cases are referred to in 26 *Laws of England* (Halsbury, 2nd ed.), §§ 604—606. Clubs are treated in monographs by Wertheimer, Daly and Sloan.

(*t*) [1919] A. C. 606.

learned lords who thought that any duty did exist do not appear to have based it on tort. Moreover, an essential feature of an action in tort is that damages should be claimable, and no case has been discovered of abuse of quasi-judicial functions in which damages have been successfully claimed *as for a tort*. They have been awarded for abuse of quasi-judicial functions by the committee of a "proprietary" club (one in which the members have no proprietary interest in the real or personal property of the club); but there the functions of the committee depend on contract or agreement (*u*).

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§ 183. Doubtful wrongs.

The most important of these is

Doubtful wrongs.

Infringement of privacy (a).—This may be described as *unauthorised interference with another person's seclusion of himself, his family or his property from the public*.—So far as it refers to seclusion of oneself (as distinct from one's property), it differs from defamation in two respects. It does not necessarily affect a person's reputation as that word is understood in the law of libel and slander; and it need not be a "statement" of any sort, *e.g.*, staring in the window of a private house.

Infringement of privacy.

(1) *Privacy of property.*—This is fairly well protected by the law, but the infringement of it is not an independent tort but a species of one or other of various torts, well known under other names. Thus infringement of copyright, patents, designs, trade-marks and trade-names is adequately dealt with by the law relating to those topics. As to privacy of land, where there is actual entry upon it we have seen in discussing loitering on the highway that the law of trespass almost, but not entirely, covers the ground (*b*). Where there is no entry on the land, the law of nuisance to some extent

(1) Privacy of property.

(*a*) 4 Laws of England (Halsbury, 2nd ed.), § 913, note (*o*), states that, although there is no direct authority on the point, yet on principle an action for damages should be available to a member of a non-proprietary club (by far the commonest kind of club), although damages might be difficult to assess.

(*a*) For Anglo-American law, see 47 L. Q. R. (1931), 23—42; and for Continental law, Professor Gutteridge and Professor Walton, *ibid.* 203—228. The American authorities down to 1932 are collected in *Graham v. Baltimore Post Co.* (Baltimore Daily Record, Nov. 9, 1932); see, too, Restatement of Torts, § 867.

(*b*) *Ante*, § 92

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secures privacy. An unreasonable amount of noise is an actionable nuisance, but cheaper and more expeditious remedies are usually provided by borough by-laws to repress the itinerant organ-grinder or the raucous newsboy (c). Where there is anything like watching or besetting a house, it is submitted that this also constitutes a nuisance (d). It may be that this would also extend to maliciously ringing up a person on the telephone 200 times a day (e).

For one form of infringement, however, there is no redress. Neither at law nor in equity will a Court prevent a landowner from opening new windows which command a view of his neighbour's premises (f). At one time there were traces of a different doctrine (g), but the modern rule was clinched by the House of Lords in *Tapling v. Jones* (1865), (h). It may create hardship in some cases, but in a densely populated country like England, the privacy of a man's landed property must give way to the building activities of his neighbours (i).

(c) *Kruse v. Johnson*, [1898] 2 Q. B. 91; *Innes v. Newman*, [1894] 2 Q. B. 292. See, too, *Stone's Justices' Manual*, sub tit. "Bye-Laws".

(d) *Lyons & Sons v. Wilkins*, [1899] 1 Ch. 255; the principle of the decision stands, although subsequent legislation may have modified it with respect to trade unions. The anonymous case of the Balham dentist referred to in *Kenny, Select Cases on Torts* (5th ed. 1928), 367, seems to be the other way, but as narrated there it is of no authority. A neighbour arranged mirrors in his own house so that he could see what passed in the study and operating-room of the dentist, who was held to have no legal remedy for the annoyance and indignity to which he was subjected. "Peeping Toms" of this sort can be bound over to be of good behaviour under 34 Edw. 3, c. 1 (1360—1361). Eavesdropping can be repressed under the same statute, and it is also a public nuisance: *Russell, Crimes* (9th ed.), 1336; see 85 *Law Journal* (1938), 408.

(e) *Times Newspaper*, June 3, 1938; the injured party took no legal proceedings, but the P.O. secured a conviction for the offence of obstructing the course of their business: see *Post Office (Amendment) Act, 1935* (25 Geo. 5, c. 15), s. 10 (2). In *Victoria Park Racing, etc., Co., Ltd. v. Taylor*, *Times Newspaper*, Jan. 20, 1938 (P. C.) (1937), 58 C. L. R. 479; 54 L. Q. R. 319—321, A on his own land watched and broadcasted descriptions of horse races held on B's land, thereby diminishing the gate money received by B; held by a majority of H. C. of Australia, A was not liable (i) for nuisance; (ii) under *Rylands v. Fletcher*; (iii) for infringement of copyright; (iv) for invasion of privacy. The Judicial Committee, without going into the merits of the case, refused B special leave to appeal, for his claim was not, in their opinion, one "involving some great principle" or "of some very wide public interest".

(f) *Turner v. Spooner* (1861), 30 L. J. Ch. 801.

(g) *Cherrington v. Abney* (1709), 2 Vern. 646 (an ill-reported case); *Le Blanc, J.*, in *Chandler v. Thompson* (1811), 3 Camp. 80.

(h) 11 H. L. C. 290, 305, 311, 317.

(i) The custom of *parda* (seclusion of women) in parts of India has been protected by law there: *Maneklal Motilal v. Mohanlal Narotumdas* (1919), I. L. R. 44 Bombay 496; *Gokal Prasad v. Radho* (1888), I. L. R. 10 Allahabad 358; but the custom is not universal. In addition to this, an easement of privacy may be acquired under the *Indian Easements Act, 1882*, s. 18. See 47 L. Q. R. 29—30.

(2) *Personal privacy*.—"Personal" refers to the seclusion not only of the man himself, but also of such members of his family as are too young to appreciate the idea of privacy (*k*). § 183.
(2) Personal privacy

There is no English decision which recognises any unqualified right of personal privacy. Such authority as exists is against allowing any action for the publication of an accurate photograph or waxwork or other effigy of a person without his permission (*l*). Thus, a defeated pugilist has no remedy against one who publishes an accurate photographic film of the fight, in which he was beaten, for the law cannot take account of his annoyance at the result of a public competition in which he has been worsted (*m*). This, however, will not exempt the exhibitor of the photograph or waxwork from an action for defamation if he places it, without any justification for doing so, in the company of likenesses of criminals, rogues or other persons and thereby creates a tendency to injure the victim's reputation (*n*).

A case of some importance and difficulty in this context is *Corelli v. Wall* (*o*). The defendants published and sold, without the consent of the plaintiff, Miss Corelli, a novelist, coloured postcards depicting bad portraits of her in imaginary incidents of her life. She sued for an injunction on two grounds—libel, and the publication of her portrait without her consent. Swinfen Eady, J., refused to issue it on either ground. First, the evidence of the alleged libel was not clear enough to justify the issue of an interlocutory injunction (it must be recollected that in libel such an injunction is granted only in the clearest cases and that it does not follow that, because it is refused, an action for damages will not lie). Secondly, there was no authority for the proposition that "a private person was entitled to restrain the publication of a portrait of herself which had been made without her authority and which, although professing to be her portrait, *was totally unlike her*". If the words italicised mean that a bad portrait

(*k*) The persecution to which Colonel Lindbergh was subjected by American journalists in connexion with his surviving child illustrates this: St. John Ervine in the *Fortnightly Review*, Feb. 1936, p. 184.

(*l*) The right of publication may, of course, be restrained by contract between the photographer and his subject: *Pollard v. Photographic Co.* (1888), 40 Ch. D. 345.

(*m*) *Palmer v. National Sporting Club, Ltd.* (1906), Macgillivray, Copy-right Cases (1905–1910), 55; *Sports, etc., Agency v. "Our Dogs" Publishing Co., Ltd.*, [1916] 2 K. B. 880; [1917] 2 K. B. 125.

(*n*) *Monson v. Tussauds, Ltd.*, [1894] 1 Q. B. 671

(*o*) (1906), 22 T. L. R. 532.

§ 183.

Distinguish
defamation.

of a person can never be defamatory, they cannot be supported in view of the later decision of the House of Lords in *Dunlop Rubber Co., Ltd. v. Dunlop (p)*, where portraits of Mr. Dunlop, falsely representing him as a foppish old gentleman were published for advertising purposes by the company without his consent and it was held that an injunction against them for libel had been rightly issued by the Court below. Much more is a caricature of an amateur golfer falsely connecting him with advertisement of the defendants' wares defamatory (q). Suppose, however, that A had made some offensive invasion of B's personal privacy which is not defamatory, has B any remedy in tort? The civil law of defamation can give no remedy for (i) a statement which is true, or (ii) a statement which does not affect a person's reputation, or (iii) conduct which is not a "statement" at all. An example of each of these may be given. (i) If a newspaper, in describing a cricket match, states truly that "Jones slouched to the wicket, unshaven, unwashed and with a patch in his trousers", this is offensive enough, but it is not a civil libel. (ii) A writes a letter to B prophesying ill luck to him unless he writes out and sends copies of the letter to ten other people. That is not defamatory, although it might conceivably be a private nuisance. (iii) A thrusts his conversation or company on a total stranger in a public place. There is no "representation" or "statement" here. It may be that such behaviour is punishable on summary conviction under some by-law, but it is doubtful whether it is actionable; at any rate it is not defamatory.

Probably
not a tort.

The balance of such authority as there is appears to be against the existence of any independent tort of offensive invasion of personal privacy (r), but there is no neat decision on the point and it is still open at any rate to the House of Lords to hold otherwise. Whether they would do so or not, it would be impertinent to speculate. But whether we must

(p) [1921] 1 A. C. 367.

(q) *Tolley v. Fry & Sons, Ltd.*, [1931] A. C. 333.

(r) Against such an action: Swinton Eady, J., in *Corelli v. Wall* (1906), 22 T. L. R. 532; Greer, L.J., in *Tolley v. Fry & Sons, Ltd.*, [1930] 1 K. B. 467, 478, in the C. A. (the point was not discussed in the H. L., [1931] A. C. 333). For such an action: perhaps Lord Halsbury in *Monson v. Tussauds, Ltd.*, [1894] 1 Q. B. 671, 687. Neutral: Collins, J., *ibid.* 679; and perhaps Horridge, J., in *Sports, etc., Ltd. v. "Our Dogs" Publishing Co., Ltd.*, [1916] 2 K. B. 880.

look to them or to Parliament to make such conduct unlawful, there seem to be strong arguments in favour of giving the aggrieved person a remedy of some sort. Redress for such invasion exists in one form or another in many of the United States of America, in parts of Canada, in South Africa and in several Continental countries (s). This is far from urging that there should be any unqualified right of personal privacy or that a person should in all circumstances claim a right "to be let alone". Every one must tolerate some publicity and nobody wishes daily newspapers to be like blue-books. It is only *offensive* invasion of privacy that is really objectionable and that ought to be made unlawful. "Offensive" is a vague term, but Judges could be safely entrusted with the task of deciding whether there were evidence enough of such offensiveness to go to the jury. There is no need to stop the propagation of news—even silly news—about people, or to stifle curiosity—even vulgar curiosity—about a neighbour's affairs. But there is a difference between "saltiness and bitterness" and between ordinary inquisitiveness and unscrupulous abuse of a person's privacy for advertising or other purposes (t).

(s) 47 L. Q. R. 34—38, 203—228.

(t) If such a limited right of privacy were established, it is suggested that it should be capable of express or implied waiver; that fair comment and privilege, as known in the law of defamation, should be applied only sparingly and, at most, by way of analogy; and that truth should be no defence.

CHAPTER XXVII

EXTINCTION OF LIABILITY IN TORT

` §§ 184, 185.

§ 184. Death.

(1) Death.

Extinction of liability in tort may take place in several ways, some of them by act of the parties, others by operation of law. It has been seen that in certain circumstances death is one such mode and we need not discuss it farther (a).

(2) Waiver.

§ 185. Waiver.

An injured party may waive his remedy in tort in favour of some other remedy and, if he does so, this extinguishes the right of action in tort. He cannot change his mind after he has selected the other remedy, and sue upon the action which he has put aside; nor can he ask the Court to elect for him (b). The reason stated in various guises is that "he cannot have it both ways", "he cannot both approbate and reprobate" (c), "he cannot blow hot and blow cold". The remedy which he actually selects may be some other action in tort, *e.g.*, he may have waived trespass for trover (d); or it may be an action on contract (e); or an action on quasi-contract, as where he sues for money had and received in preference to bringing trover (f); or some other kind of proceeding, like a petition in bankruptcy (g).

What he does must of course amount to waiver, and there has been some litigation on what constitutes election of a remedy. Final judgment in an action on the injured party's claim is certainly a waiver which will preclude him from exploiting an alternative action on the same claim (h); but the mere commencement of an action for money lent (*i.e.*, an action on contract) or for money had and received (*i.e.*, an action on quasi-contract) is not a waiver of an action in tort

(a) *Ante*, Chap. VII.(b) *British Ry., etc., Co. v. Roper* (1940), 162 L. T. 217.

(c) See [1940] A. C. at pp. 416—418.

(d) *Rodgers v. Maw* (1846), 15 M. & W. 444, 448.(e) *Verschures Creameries, Ltd. v. Hull, etc., S.S. Co., Ltd.*, [1921] 2 K. B. 608.(f) *Allanson v. Atkinson* (1813), 1 M. & S. 583.(g) *Smith v. Baker* (1873), L. R. 8 C. P. 350; *Roe v. Mutual Loan Fund* (1887), 19 Q. B. D. 347.(h) *Smith v. Baker* (last note).

on the same facts, if for one reason or another the first action is not pushed to judgment (i). Receipt of a sum of money paid by the tortfeasor and accepted as a complete discharge of the tortfeasor's liability bars a subsequent action; e.g., where A was the agent of B and wrongfully converted B's goods and B had the choice of suing A in tort or of adopting his acts as an agent and B chose the latter course and received payment from A in that capacity, it was held that B could not subsequently sue in tort (k). Beyond such clear cases as these, waiver is a question of fact to be determined by the circumstances of each case. If an act is ambiguous in character, it does not amount to election (l); much less where it is explicable on some other ground. A mere demand for payment of compensation for a tort is no waiver of an action for it (m); ~~nor is part payment of what is due, unless it is accepted as a full discharge~~ (n); nor is the commencement of an action with alternative claims in tort and for money had and received (o); and if one and the same act constitutes two different torts, the suing of an action ~~for both of them is no waiver of either of them~~ (p).

Waiver of tort in favour of quasi-contract.—There is one form of waiver which is important enough to deserve special examination. This is where the waiver consists in selecting ~~an action upon quasi-contract~~ in preference to suing upon the tort. There are several varieties of quasi-contract, but the particular one with which we are concerned here is that which, when the old forms of action were in force, was redressed by a claim upon *indebitatus assumpsit* (q). Of the origin of this action we shall have more to say in the next chapter. Forms of action have been greatly simplified but even at the present day some practitioners are more familiar with the phrases "*indebitatus counts*" (which was the name

Waiver of tort for quasi-contract.

(i) *United Australia, Ltd. v. Barclays Bank, Ltd.*, [1941] A. C. 1.

(k) *Brewer v. Sparrow* (1827), 7 B. & C. 310.

(l) A. L. Smith, L.J., in *Rice v. Reed*, [1900] 1 Q. B. 54, 66.

(m) *Valpy v. Sanders* (1848), 5 C. B. 886; *Morris v. Robinson* (1824), 3 B. & C. 196.

(n) *Burn v. Morris* (1834), 4 Tyrw. 485; *Lythgoe v. Vernon* (1860), 5 H. & N. 180.

(o) *Rice v. Reed*, [1900] 1 Q. B. 54, 65.

(p) *Caxton Publishing Co., Ltd. v. Sutherland Publishing Co., Ltd.*, [1939] A. C. 178, 199.

(q) "Thoughts much too deep for tears should the Court
When I *assumpsit* bring, and god-like waive a tort."

The Circuiters, 1 L. Q. R. 233.

§ 185.

given by the old pleaders to claims on *indebitatus assumpsit*) or "implied contract" than with the term "quasi-contract" (r). Be that as it may, there is no doubt that quasi-contractual liability, which we have defined as "liability, not exclusively referable to any other head of the law, imposed upon a particular person to pay money to another particular person on the ground of unjust benefit" (s), is well recognised in our law.

Why
employed?

At the outset, why should a plaintiff ever wish to waive his action in tort for one in quasi-contract? His preference seems to be the more remarkable in view of the fact that in such waiver he has got to prove in the first instance that the tort has been committed, although the Court does not insist on the establishment of mere technical ingredients in the wrong (t). The explanation is that under the old system of pleading *indebitatus assumpsit* had many advantages over an action in tort (u). True, these advantages were not all confined to the plaintiff, but he was willing to take the risk of the defendant also reaping a benefit because both parties escaped the difficulty and precision of that intricate art, "special pleading". Modern procedural reforms have obliterated many of these advantages, but even nowadays a plaintiff may still find it useful to waive a tort (a).

What torts
can be
waived?

Next, what torts can be waived? In 1831, Tindal, C.J., thought that there was no limit except that the defendant must not be prejudiced (b). But this is of little help at the present day, and it is inconceivable how waiver can apply to some torts. The essence of *indebitatus assumpsit* was that the plaintiff claimed that the defendant "had and received" money which belonged to the plaintiff, and that is still the essence of the particular species of quasi-contractual claim which has succeeded to the *indebitatus* counts. Now, if the tort committed by the defendant were assault or defamation, what money has been "had and received" by

(r) Both the history and much of the present law of waiver of a tort in favour of an action on quasi-contract have been thoroughly explored by Dr. R. M. Jackson, *History of Quasi-Contract in English Law* (1936), 61—84. Cf. Winfield, *Province of the Law of Tort*, 168—176.

(s) *Ante*, § 4.

(t) *Heilbut v. Nevill* (1870), L. R. 5 C. P. 478.

(u) They are detailed in Winfield, *op. cit.*, 143—146.

(a) *Bavins v. L. & S. W. Bank*, [1900] 1 Q. B. 270; *United Australia, Ltd. v. Barclays Bank, Ltd.*, [1941] A. C. 1.

(b) *Young v. Marshall*, 9 Bing. at p. 44.

him? A claim in quasi-contract is obviously inapplicable. Some limit there must be to the torts that can be waived, but what it is can only be conjectured in view of some of the decided cases. We can at any rate enumerate the torts which do admit of waiver, and we can then consider the doubtful cases. There is no doubt about conversion, trespass to land or to goods, deceit, some instances of actions upon the case and the action for extorting money by unlawful threats (c). Conversion (or trover, as the old remedy for it was called) has long been recognised as capable of waiver (d). Waiver of trespass to land, where it results in the sale of things extracted from the land, is permissible (e) unless the trespass was committed merely as a mode of establishing a right or unless exemplary damages be claimed (f). So, too, waiver of trespass to goods if the trespasser has subsequently, either in fact or in the eye of the law turned the goods into money (g). The tort of deceit in its modern sense can be waived (h), although there are exceptions to this; thus, deceit is the appropriate action and waiver is not possible if the right to rescind a contract for fraud no longer exists because restitution of the property is impossible. "If you are fraudulently induced to buy a cake, you may return it and get back the price, but you cannot both eat your cake and return your cake" (i). If you have eaten it, you can sue in tort for deceit, but not for the return of the price; and it is obvious that the damages recoverable in such circumstances for deceit may well be less than the price paid for the article. In this connexion, it is better to include under waiver of deceit the action upon an obligation to compensate a person for having obtained his services by fraud (k). Another tort which can be waived is usurpation of an office which in fact belongs to the plaintiff. Thus in *Howard v. Wood* (l) the defendant

(c) For money paid under compulsion which does not necessarily amount to a tort, see *Jackson, op. cit.*, 64—72.

(d) The H. L. regarded this as settled in *Marsh v. Keating* (1834), 1 Bing. N. C. 198, 215—216. See, too, *Thomas v. Whip* (1715), Buller N. P. 130.

(e) *Powell v. Rees* (1837), 7 A. & E. 426.

(f) *Jackson, op. cit.*, 75.

(g) *Oughton v. Seppings* (1830), 1 B. & Ad. 241; *Rodgers v. Maw* (1846), 15 M. & W. at p. 448; *Neate v. Harding* (1851), 6 Ex. at p. 351.

(h) For application of waiver to deceit in its older meaning of swindling a Court of Justice, see *Jackson, op. cit.*, 74.

(i) *Crompton, J.*, in *Clarke v. Dickson* (1858), E. B. & E. 148, 152.

(k) *Rumsey v. N. E. Ry.* (1863), 14 C. B. (N.S.) 641; discussed in *Winfield, op. cit.*, 171.

(l) (1678), 2 Show. 21; 2 Lev. 245; *Freeman K. B.* 478; *T. Jones* 126.

 § 185.

Doubtful
cases of
waiver.

had wrongfully taken the fees of a stewardship which properly belonged to the plaintiff, who was allowed to recover them by *indebitatus assumpsit* (m).

So much for torts which certainly can be waived. Outside them we are in a region of doubt. Two older cases push the doctrine to such lengths that it becomes scarcely recognisable. In *Lightly v Clouston* (n), A induced B's apprentice, in breach of his apprenticeship, to work for A. B was allowed to waive A's tort and to sue A in *indebitatus assumpsit* for work and labour done by the apprentice for A. Mansfield, C.J., regarded it as long settled in cases of sale that if the plaintiff chose to sue for the produce of the sale, he might do so, and that the like principle applied here; it was not competent to the defendant to argue that he got the apprentice's labour, not by contract but by tort. A few years later this decision was followed with some hesitation by Lord Ellenborough, C.J., in *Foster v. Stewart* (o). It is uncertain whether either decision would be adopted at the present day. Their dates are material in the sense that many of the procedural advantages given by *indebitatus assumpsit* have been extinguished by later legislation, so that now there is not so much reason for giving a wide scope to waiver. Again it is difficult to find a complete answer to counsel's argument in *Foster v. Stewart* that, if waiver were allowed there, "as well might it be said, that if a man take the goods of another, the owner of the goods may have *assumpsit* against him for goods sold" (p). On the other hand, we have just seen that waiver is possible where the tort is extortion by threats and there is not much difference between that and waiving the conversion which consists in taking a man's goods without any threat (q). Upon the whole, it may be conjectured that even if *Lightly v. Clouston* and *Foster v. Stewart* are still law, the Courts would not now be disposed to add to the list of torts which can be waived (r).

(m) For other cases, see Jackson, *op. cit.*, 61—64.

(n) (1808), 1 Taunt 112.

(o) (1814), 3 M & S 191.

(p) 3 M & S 196.

(q) Dr. Jackson, *op. cit.*, 76—77, regards the test of possibility of waiver of a tort as "the principle that an action for money had and received would not lie unless a specific sum of money had been received, or could be deemed to have been received." But the learned author admits that the words italicised make the principle vague and difficult to apply.

(r) Cf Viscount Simon, L C, in [1941] A C at pp. 12—13.

§ 186. Accord and satisfaction (s).

§ 186.

Tortious liability can be extinguished by agreement for valuable consideration between the injured party and the tortfeasor (t). This is styled accord and satisfaction: "Accord" signifies the agreement, "satisfaction" the consideration which makes it operative. This mode of discharge is not confined to tortious liability but extends to any civil obligation. The satisfaction may be either executed, e.g., "I release you from your obligation in consideration of £100 now paid by you to me"; or it may be executory, e.g., "I release you from your obligation in consideration of your promise to pay me £100 in six months". Formerly the law was that if the satisfaction were executory, that was no discharge, but this doctrine was due to the fact that the law as to accord and satisfaction was earlier in origin than the doctrine that, in executory contracts, mutual promises may form a sufficient consideration for each other whether they are carried out or not. Lip-service was paid to the older doctrine long after it was settled that satisfaction may be executory, but in 1933 the Court of Appeal recognised the more recent view (u).

(3) Accord and satisfaction.

Accord and satisfaction may be conditional. A person injured in a railway accident brought about by the negligence of the company may accept an offer of compensation, reserving to himself the right to renew his claim if his injuries turn out to be worse than they were at the time of the accord (a).

What is the position of the parties if the accord and satisfaction are not carried out? Are they in the same situation as if it had never been made or must the party aggrieved sue upon the broken accord and satisfaction and upon that only? The answer is that it depends upon the construction of the agreement which embodies the accord and satisfaction. If the satisfaction consists of a promise on the part of the tortfeasor, the interpretation of the agreement may be, "I accept this promise as an absolute discharge of your

Non-performance of accord and satisfaction.

(s) Salmond & Winfield, Contracts, § 106.

(t) *Peytoe's Case* (1611), 9 Rep. 77b.

(u) *British Russian Gazette, etc., Ltd. v. Associated Newspapers, Ltd.*, [1933] 2 K. B. 616, 643, 650.

(a) *Lee v. L. & Y. Ry.* (1871), L. R. 6 Ch. 527; *Ellen v. G. N. Ry.* (1901), 17 T. L. R. 453; *North British Ry. v. Wood* (1891), 18 Sc. Sess. Cas. (4th ser.), 27 (H. L.).

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tortious liability"; if so, all that the injured party can sue upon in the event of the tortfeasor not carrying out his promise, is the contract which has been substituted for the tortious liability. Alternatively, the interpretation of the agreement may be, "I accept this promise as a discharge of your liability provided you carry it out"; in that case, if the promise is not fulfilled, the injured party has two alternative remedies: he can either fall back upon his original claim in tort, or he can sue upon the contract which was intended to take its place. Somewhat different considerations apply to an accord and satisfaction which is expressed to be conditional in the first instance, as in the example given above of provisional acceptance of compensation in a railway accident. Here the injured party cannot have recourse to his action in tort unless the condition is not fulfilled. If it is fulfilled within the time specified by the agreement or, if no time is specified, within a reasonable time, then the tortious liability is extinguished. If it is not thus fulfilled, then the injured party can either rely upon his claim in tort or sue upon the conditional agreement which was substituted for it and which has been broken (b).

Release.

Closely akin to accord and satisfaction is release of tortious liability given by the injured party. In fact, there seems to be little difference between the two except that a release is usually, but not necessarily, embodied in an instrument under seal and the necessity for consideration which is requisite in accord and satisfaction is thus avoided (c). Release is apparently effective whether it is given before or after an action against the tortfeasor commenced (d).

(4) Judgment.

§ 187. Judgment.

Final judgment by a Court of competent jurisdiction extinguishes a right of action. It has a twofold effect. First, it estops any party to the litigation from disputing afterwards the correctness of the decision either in law or in fact. Secondly, it operates as a merger of the original cause of action in the rights created by the judgment; and

(b) Salmond & Winfield, *Contracts*, 331—333.

(c) *Phillips v. Clagett* (1843), 11 M. & W. 84; *Laws of England* (Halsbury, 2nd ed.), vol. 7, §§ 344—350; vol. 32, § 307.

(d) *Apley Estates Co., Ltd. v. De Bernales*, [1946] 2 A. E. R. 338, 340 (per Evershed, J.). The C. A. affirmed his decision, but without reference to this point; [1947] 1 Ch. 217.

these are either to levy execution against the defendant or to bring a new action upon the judgment (not upon the original claim, for that has perished).

The reason why judgment wipes out the plaintiff's original cause of action is put on either of two grounds. One is public policy: *interest reipublicæ ut sit finis litium*; the other is private justice: *nemo debet bis vexari pro uno et eodem delicto* (e). However, judgment is no bar to another action unless the cause of action is the same, and we have discussed in an earlier chapter the cases in which successive actions are maintainable (f).

It only remains to add a word as to the case in which the injured party has two alternative claims upon the same set of facts. If he sues upon one of them and judgment is given in that action, can he afterwards pursue the claim in another action? In general, no, for that would be merely vexatious litigation. Thus in *Buckland v. Johnson* (g) X converted the plaintiff's goods by selling them for £150, the whole of which was paid to the defendant. The plaintiff sued X for conversion and for money had and received and recovered judgment against him for £100. X was unable to satisfy this judgment, so the plaintiff sued the defendant for money had and received, but it was held that judgment in the earlier action barred the second claim. If the same facts have given rise to substantially one and the same cause of complaint, no further action can be brought even though there are technical and formal differences between the two causes of action, or the two remedies have different names; if they are essentially (and not merely technically) separable, judgment upon one will not bar action upon the other, but, even if they are essentially separable, neither the county courts nor the High Court will tolerate the splitting of demands when doing so would be vexatious or oppressive (h).

(e) Bower, *Res Judicata* (1924), 1—2.

(f) *Ante*, pp. 149—153.

(g) (1854) 15 C. B. 145. The facts of a case may be such as to enable the defendant successfully to plead *res judicata*, or to have the action dismissed as frivolous and vexatious: *Wright v. Bennett*, [1948] 1 A. E. R. 227. See, too, *Greenhalgh v. Mallard*, [1947] 2 A. E. R. 225 (*ante*, p. 435).

(h) Winfield, *Province of the Law of Tort*, 228.

§ 188.

(5) Statutes
of Limita-
tion.

§ 188. Statutes of Limitation (i).

Whether a person's claim is based upon tort or upon any other form of injury, he will lose his remedy if he falls asleep upon it. The reasons for this are twofold. In the first place, no one ought to be exposed to the risk of stale demands of which he may be quite ignorant and which, owing to changed circumstances, he may be unable to satisfy. Secondly, it may have become impossible or difficult, owing to the loss of documents or the death of witnesses, to establish a defence which would have negatived the claim if it had been prosecuted more promptly.

The Limitation Act, 1939 (j), has greatly simplified the law as to the lapse of time that will bar an action in tort. The older law was contained in a rambling and slovenly piece of legislation, the Statute of Limitation, 1623 (k). The Act of 1939, which came into effect on July 1, 1940, provides that actions founded on simple contract or tort shall not be brought after the expiration of six years from the date on which the cause of action accrued (l).

Commence-
ment of
period.

When does the period of limitation begin to run?—According to the Act of 1939, “from the date on which the cause of action accrued”. No further explanation of “accrued” is given, so the authorities on the older law are still in point. They show that the period begins to run “from the earliest time at which an action could be brought” (m), and its practical application in the law of tort is as follows.

Where the tort is actionable *per se*, as in trespass and conversion, the time begins to run at the moment of the wrongful act, whether the injured party knows of it or not,

(i) By far the best statement of the principles of these Statutes is in the Fifth Interim Report of the Law Revision Committee (Statutes of Limitation), 1936. Cmd. 5334. H.M. Stationery Office. It is cited in this section as “5th Report”. Monographs on the topic are those of Darby & Bosanquet (2nd ed. 1893); Banning (3rd ed. 1906); Lightwood (1909); Preston & Newsom (2nd ed. 1943). See, too, 20 Laws of England (Halsbury, 2nd ed.), pp. 612—617.

(j) 2 & 3 Geo. 6, c. 21; founded on the 5th Report (last note).

(k) 21 Jac. 1, c. 16; discussed at length in the first edition of this book, pp. 679—690.

(l) Sect. 2 (a). The 5th Report, p. 42, recommended that simple contract in this context should include quasi-contract. Presumably that is the intention of the Act, although no express mention is made of quasi-contract. Cf. Preston & Newsom, *op. cit.*, 22, 30—32.

(m) Lindley, L.J., in *Reeves v. Butcher*, [1891] 2 Q. B. 509, 511. A highly technical variant of this was laid down by Lord Esher, M.R., in *Coburn v. Colledge*, [1897] 1 Q. B. 702, 706—707. See generally Preston & Newsom, *op. cit.*, Chap. II.

provided there is no fraudulent concealment (n). Where the tort is actionable only on proof of special damage, the time runs only from the moment when the damage occurred (o). Some torts, however, may be of a continuing nature; this is usually so with nuisance, frequently so with false imprisonment and occasionally so with trespass. In that event, a fresh cause of action arises *de die in diem* and the plaintiff can recover for such portions of the tort as lie within the time allotted by the Statute. Thus, where A was wrongfully imprisoned by B for ten years and began his action for false imprisonment directly he was released, B was held liable for the detention during the four years immediately preceding the action (four years being at that date (1691) the period of limitation for that tort), but not for the detention during the first six years (p).

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The period does not begin to run until there is some one in existence capable of suing, for until then no right of action has accrued. Hence, when goods belonging to a person who has died intestate have been converted after his death, the proper party to sue is, of course, the administrator and the time does not begin to run until he has taken out letters of administration (q). So, too, there must be a defendant capable of being sued; thus, where the tortfeasor was abroad when the cause of action accrued, and he remained so until his death, the time did not begin to run against his executor until the latter had proved the will, for the period during which the deceased was abroad was excluded by the Statute from computation (r). If, however, the time has once begun to run, it will continue to do so even over a period during which there is no one capable of suing or of being sued (s).

Parties must be in existence.

The Act of 1939 has altered the law relating to the effect of disability of the plaintiff. "Disability" is limited (t) to one who is an infant, or of unsound mind (u), or a convict

Disabilities.

(n) *Granger v. George* (1826), 5 B. & C. 149.

(o) *Backhouse v. Bonomi* (1861), 9 H. L. C. 503.

(p) *Coventry v. Apsley* (1691), 2 Salk. 420; *Massey v. Johnson* (1809), 12 East 67; *Bailey v. Warden* (1815), 4 M. & S. 400; *Hardy v. Ryle* (1829), 9 B. & C. 603.

(q) *Pratt v. Swaine* (1828), 8 B. & C. 285. The principle was laid down generally in *Murray v. East India Co.* (1821), 5 B. & Ald. 204, which, however, was not an action in tort.

(r) *Douglas v. Forrest* (1828), 4 Bing. 686.

(s) *Rhodes v. Smethurst* (1838), 4 M. & W. 42; 6 M. & W. 351.

(t) Sect. 31 (2).

(u) In *Harnett v. Fisher*, [1927] A. C. 573, it was held that a person who was wrongfully detained as a lunatic under the Lunacy Act, 1890, was

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to whom no administrator has been appointed under the Forfeiture Act, 1870 (*ante*, § 28). If, on the date when the right of action accrued, the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of six years from the date when the person either (i) ceased to be under a disability, or (ii) died, whichever event first occurred (a). No disability of the defendant prevents the running of the period. Formerly his absence beyond the seas delayed the commencement of the period until his return, but modern facilities for service of a writ on a defendant who is abroad made this concession to the plaintiff of little practical value, and it has vanished under the Act of 1939. The Limitation (Enemies and War Prisoners) Act, 1945, provides that if, at any time before the expiration of the period prescribed by any statute of limitation, any person, who would have been a necessary party to the action if it had been brought, was an enemy or was detained in enemy territory, the period shall be deemed not to have run while the said person was an enemy, or was so detained, and shall in no case expire before the end of twelve months from the date when he ceased to be an enemy or to be so detained, whichever is the later (b).

Cumulative disabilities.

What is the position of a plaintiff who is sane when the time begins to run but later becomes insane; or of a plaintiff who is a minor when the cause of action would otherwise have accrued and who becomes insane after he attains majority; or of a plaintiff who is under a disability at the moment when he succeeds to the title of a predecessor who was under no disability? The Act of 1939 in effect provides that a disability which arises after the time began to run has no effect (c); this rule may be productive of hardship to the plaintiff, but facts which give rise to its application are not likely to occur often and there might be quite as much

not under a disability on the ground of lunacy. The Act of 1939, s. 31 (2), conclusively presumes that, for the purposes of the Act, such a person is of unsound mind. See Preston & Newsom, *op. cit.*, 203.

(a) Sect. 22. The punctuation in the printed copy of the statute is misleading here, but I believe that the statement in the text (*supra*) is what the section means (see 5th Report, para. 17 (d)).

(b) 8 & 9 Geo. 6, c. 16. For further details, especially as to definitions of terms, the Act itself must be consulted. It took effect as from September 3, 1939.

(c) Sect. 22 (a); giving effect to *Garner v. Wingrove*, [1905] 2 Ch. 233.

hardship to the defendant if the rule were otherwise (d). Where there are successive disabilities in the same person, e.g., lunacy supervening on minority, the time does not run until the last of the disabilities has ended, provided that there is no interval of ability between any of the disabilities (e). If a right of action accrues to A, who is under a disability, and A dies and B, who is also under a disability, succeeds to A's right, no further extension of time is allowed by reason of B's disability (f).

§ 188.

Fraud and concealed fraud.—The Act of 1939, s. 26, provides that where (i) the action is based upon the fraud of the defendant, or his agent or any person through whom he claims or his agent; or (ii) the right of action is concealed by the fraud of any such person as aforesaid, the period of limitation shall not begin to run until the plaintiff has discovered the fraud, or could with reasonable diligence have discovered it. But this does not enable an action to be brought against any *bona fide* purchaser for value of property where there has previously been fraud on the part of some other person.

Fraud.

The section has removed doubts that had arisen as to the treatment of fraud at Common Law and in Equity respectively, but it does not define "concealed fraud", so that the earlier authorities are still relevant.

"Concealed fraud" is a loose phrase, for it is not limited to calculated acts of deception. It extends also to wrongs done furtively which have not come to the plaintiff's knowledge (g). At one time it was argued that, even conceding the point that concealed fraud would prevent application of the Statute of Limitation, yet it would do so only if the defendant *actively* prevented detection. But this qualification was scouted as contrary to common sense in *Bulli Coal Mining Co. v. Osborne* (h): "Two men, acting independently, steal a neighbour's coal. One is so clumsy in his operation, or so incautious, that he has to do something more to conceal his fraud. The other chooses his opportunity

Includes
furtive
wrongs.

(d) Fifth Report, s. 16; in view of this, the Committee made no recommendation for change in the law.

(e) *Borrows v. Ellison* (1871), L. R. 6 Ex. 128 (the Act of 1939 gives statutory effect to this: *Preston & Newsom, op. cit.*, 202).

(f) Sect. 22 (b).

(g) *Bulli Coal Mining Co. v. Osborne*, [1899] A. C. 351, 362–363; *Oelkers v. Ellis*, [1914] 2 K. B. 139; *Lynn v. Bamber*, [1930] 2 K. B. 72, 80.

(h) [1899] A. C. 351, 363–364.

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so wisely, and acts so warily, that he can safely calculate on not being found out for many a long day. Why is the one to go scot-free at the end of a limited period rather than the other? ”

Rights barred
as well as
remedies.

Extinction of rights as well as remedies.—The Act of 1623 did not extinguish the rights of the plaintiff but only barred his remedies. It was otherwise with legislation which fixed periods of limitation for the recovery of land, for the title to land is such a complicated matter that it would be unfair to a transferee of it to keep alive the rights of other persons after their remedies had expired. In the law of tort the chief application of the distinction between rights and remedies was with respect to conversion, for conversion of A's goods by B did not obliterate A's title to them. The Act of 1939 retains the general rule that, with respect to land, rights as well as remedies are extinguished (i) and it has wiped out the distinction in the law of conversion; whether the claim be for conversion or for detinue, the rule is the same (k). Moreover, the Act settled some problems allied to this topic. Thus, it had been held in *Miller v. Dell* (l) that if X wrongfully misappropriates my goods and transfers them to Y after my action against X has been barred, nevertheless the period of limitation will begin to run against Y only from the moment when he commits his act of conversion. This is no longer law, for section 3 (1) of the Act provides that where any cause of action in respect of conversion or wrongful detention of a chattel has accrued to any person and, before he recovers possession, a further conversion or wrongful detention takes place, no action shall be brought in respect of the further conversion or detention after the expiration of six years from the accrual of the original cause of action. This sub-section also overrules *Wilkinson v. Verity* (m) in so far as that puzzling case decided that where A converted B's goods and later committed detinue of them, the period of limitation ran from the detinue and not simply from the conversion (n).

(i) Sect. 16. Actions for the recovery of land are relevant in this book only to the extent of their treatment in § 97, *ante*.

(k) Sect. 3 (2).

(l) [1891] 1 Q. B. 468.

(m) (1871). L. R. 6 C. P. 206, 209.

(n) It is debatable what the case did decide. See du Parcq, J., in *Betts v. Receiver of Metropolitan Police*, [1932] 2 K. B. 595, 605–606, and the first edition of this book, pp. 689–690.

Concurrent or alternative claims.—Suppose that A has injured B in such a way that he has committed not only a tort but also a breach of a contract under seal (o), or a fraudulent breach of trust (p). Here the periods of limitation are not the same. Which is to be selected if B's claim is alive under one of these heads but is dead under the other? The problem has been discussed elsewhere (q) and we need only say here that its solution depends on two considerations : (i) the interpretation of the particular statutes applicable ; (ii) the question, "which is the substantial cause of action among the two or more that are the subject of litigation?"

'9
§ 188. 19
Concurrent
or alternative
claims.

Special periods under other Statutes.

(i) *The Public Authorities Protection Act, 1893* (r), as amended by the *Limitation Act, 1939*, s. 21 (1), provides that "No action shall be brought against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any neglect or default in the execution of any such Act, duty or authority, unless it is commenced before the expiration of one year from the date on which the cause of action accrued : Provided that where the act, neglect or default is a continuing one, no cause of action in respect thereof shall be deemed to have accrued, for the purposes of this sub-section, until the act, neglect or default has ceased."

Special
periods.
(i) Public
Authorities,
etc., Act.
1893.

The object of this enactment was to protect absolutely the acts of public officials, after a very short lapse of time, from challenge in the Courts and, so far as important administrative acts are concerned, there can be little doubt that the policy was a sound one. But unfortunately the judicial interpretation of the Act yawed several points off its original aim, for the great majority of the cases in which it has been pleaded have been upon the negligence of municipal tram-drivers or medical officers and the like, and there is no valid argument for giving them a special privilege simply because they are remunerated out of the public funds.

(o) The period for which now is twelve years: Act of 1939, s. 2 (3).
 (p) No lapse of time will help the defendant here under the Act of 1939, s. 19 (1).
 (q) Winfield, *Province of Tort*, Chap. XI. It is less likely to occur since the Act of 1939 has made the period uniform in several (but not all) branches of the law.
 (r) 56 & 57 Vict. c. 61, s. 1.

It is beyond our scope to give even in summary form the decisions upon the Act of 1893 (s), but one or two conspicuous points may be noticed. The chief amendments effected by the Act of 1939 were : (i) It prolonged the period of six months in the Act of 1893 to one year. (ii) It fixed the commencement of the period at the date of the accrual of the cause of action instead of at the date of the act, neglect or default; this does not appear to have altered the effect of *Carey v. Metropolitan Borough of Bermondsey* (t), which was decided under the Act of 1893. The plaintiff had been injured by the negligence of the defendants in their repair of a road. More than six months later and while she was still suffering from the effects of the injury, the plaintiff sued the defendants.

The Court of Appeal held that the action was barred because, under the Act of 1893, time ran from the moment at which the accident occurred (u). The decision has been criticised as harsh to the plaintiff, but it seems that, even under the wider proviso of the Act of 1939, "the act, neglect or default" could not be described as a "continuing one". The harm that it inflicted might continue, but the act which caused that harm was done once and for all and could not be discontinued. An instance of a continuing act, neglect or default would be A's wrongful excavation of soil which at a later date leads to the collapse of his neighbour's land (a).

The Act of 1893 made no allowance for disability of the plaintiff; this is amended by the Act of 1939 (b).

(ii) *Maritime Conventions Act, 1911.*

(ii) *The Maritime Conventions Act, 1911* (c), fixes two years as the period of limitation for actions for damage to a vessel, her cargo, freight or any property on board her, or for damages for loss of life or personal injuries suffered by any person on board. It enables the Court, however, to extend this period on such terms as it shall think fit (d).

(iii) *Statutes connected with death.*

(iii) *Statutes connected with death* have fixed especially short periods.

(s) They are collected in 13 Halsbury's Statutes, 455—460.

(t) (1903), 20 T. L. R. 2.

(u) See, too, *Huyton and Roby Gas Co. v. Liverpool Corporation*, [1926] 1 K. B. 146; *Freeborn v. Leeming*, *ibid.* 160.

(a) Cf. 5th Report, pp. 36—37; Preston & Newsom, *op. cit.*, 195.

(b) Sect. 22 (d); but, with regard to infancy and unsoundness of mind, the plaintiff must prove that the person under such a disability was not, at the time when the right of action accrued to him, in the custody of a parent.

(c) 1 & 2 Geo. 5, c. 57, s. 8.

(d) The 5th Report, s. 29, regarded this section of the Act as satisfactory.

The Fatal Accidents Act, 1846 (e), requires actions under it to be brought within twelve months after deceased's death (f). Suppose that the action were brought against a public authority, was the period to be six months under the Act of 1893 or twelve months under the Act of 1846? After a remarkable conflict of judicial opinion, it seems to be settled that the period is twelve months (g), and the rule is still of practical importance although the Act of 1939 makes the period under the Act of 1893 one year instead of six months (h).

The Law Reform (Miscellaneous Provisions) Act, 1934 (i), provides in general that if a person commits a tort and dies thereafter, the cause of action against him shall survive against his estate, but if proceedings in the action were not pending at the date of death, then the cause of action must have arisen not earlier than six months before death, and proceedings must be taken within six months of the deceased's personal representatives taking out representation. The policy of the Statute in fixing such a short period was to enable the winding up of estates to be completed with all reasonable speed (k).

(iv) *Statutes connected with workmen's compensation also fix short periods.* (iv) Workmen's compensation.

Under the Employers' Liability Act, 1880 (l), it is six months from the occurrence of the injury, or, in case of death, twelve months from the time of death.

§ 189. Assignment of right of action in tort (m).

This topic may be conveniently treated here, although it relates not to extinction of liability in tort, but to transfer of a right of action in tort. Assignment of right of action: generally not allowed.

It is a familiar rule in the law of assignment of choses in action that, while property can be lawfully assigned, a bare right to litigate cannot. Consistently with this, a right of action in tort is not in general assignable. Such a transfer

(e) 9 & 10 Vict. c. 93, s. 3. *Ante*, § 57.

(f) The 5th Report, s. 28, regards the period as a reasonable one.

(g) *British Columbia Electric Ry. v. Gentile*, [1914] A. C. 1034; *Venn v. Tedesco*, [1926] 2 K. B. 227.

(h) See *Salmond*, Torts, 352.

(i) 24 & 25 Geo. 5, c. 41, s. 1 (3). *Ante*, § 58.

(k) 5th Report, s. 28. No change was recommended.

(l) 43 & 44 Vict. c. 42, s. 4.

(m) Winfield, *Present Law of Abuse of Procedure* (1921). 67—69.

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would border upon the tort of maintenance; at any rate that is the trend of judicial opinion, if not of judicial decision, throughout the history of maintenance (n). The reason suggested in Elizabethan times was that the damages in such an action are at the date of the purported assignment uncertain, "and perhaps the assignee may be a man of great power, who might procure a jury to give him greater damages" (o). The first part of this reasoning is unconvincing and the latter part is obsolete. Principles better suited to modern law are that such an assignment is contrary to public policy (p) or that it savours of maintenance (q). It is obvious that if the rule were otherwise, speculation in law-suits of an undesirable kind would be encouraged.

Exceptions.

The following exceptions to the rule are recognised.

(1) Death.

(1) *Transmission on death* (ante, Chapter VII).

(2) Bankruptcy.

(2) *Bankruptcy*.—One of the rules in the law of bankruptcy is that demands in the nature of unliquidated damages arising otherwise than by reason of a contract, promise, or breach of trust are not provable (r). Hence, as actions in tort are usually for unliquidated damages, neither the liability of the tortfeasor nor the right of action of the injured party ought, in general, to pass to the trustee in bankruptcy of either. With respect to liability this is true almost without qualification. The tortfeasor, if he becomes bankrupt, remains liable and it is he and not the trustee in bankruptcy who must be sued. But where the claim has become liquidated before the bankruptcy, the injured party can prove for it in bankruptcy. Thus in *Ex p. Mumford* (s), A seduced B's daughter. B sued A for seduction. A compromised the claim by giving B promissory notes for £223. A then became bankrupt and it was held that B could prove for the value of the notes against A's trustee.

As to the right of action for a tort, the law seems to be

(n) Farwell, L.J.'s emphatic opinion in *Defries v. Milne*, [1913] 1 Ch. 98, 109, against the legality of such an assignment was *obiter*, but the learned L.J.'s inference from *Prosser v. Edmonds* (1835), 1 Y. & C. 481, seems irresistible. Cf. Williams, *Personal Property* (18th ed. 1926), 180—183, and an article by T. C. Williams in 10 L. Q. R. 143—157.

(o) Argument in *Anon.* (1600), Godbolt 81.

(p) *Defries v. Milne*, [1913] 1 Ch. 98.

(q) Cozens-Hardy, L.J., in *Fitzroy v. Cave*, [1905] 2 K. B. at p. 371.

(r) Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 30 (1).

(s) (1808), 15 Ves. Jr. 289.

this. If the tort were a purely personal one, like assault or defamation, the right of action for it remains exercisable by the injured party himself, and does not pass to his trustee in bankruptcy; but where the tort was to his property, *e.g.*, conversion of goods, then the right to sue for it passes to the trustee who can sell or assign it to any one else, as he, in his discretion, thinks fit. Now the same set of facts may give rise to injuries to both the person and the property of X. That often happens with the tort of negligence. So, too, trespass to land is occasionally accompanied by violence to the person in possession of it. It is probable, but not certain, that in such circumstances the claim for the personal injury remains with the bankrupt while that for injury to his property passes to his trustee (t). At any rate the suggestion has in its favour, first, the general principle that it is the bankrupt's property with which the trustee is primarily concerned, and, secondly, the argument that if a claim for personal injuries done to the bankrupt passed to the trustee, he might find it awkward to prosecute it if the bankrupt were unwilling to engage in the action at all.

(3) *Subrogation (u)*.—The commonest example of subrogation in this connexion is in the law of insurance. An insurance company which has compensated a policy-holder stands in his shoes with regard to his claims against the person who caused the injury. Hence, if A by negligent driving of his car injures B, and the X company, with whom B is insured, compensates him, the X company can exploit B's action for negligence against A.

(3) Subroga-
tion.

(4) *Judgment*.—Where judgment has been entered for damages in an action for tort, the damages become a judgment debt and are therefore assignable (a). Closely akin to this is the rule which permits assignment of the fruits of an action which has been commenced but has not yet proceeded to judgment. It is not obnoxious to the law of champerty and maintenance, for it is not an assignment of a cause of action,

(4) Judg-
ment.

(t) Lord Campbell in *Rogers v. Spence* (1846), 12 Cl. & F. 700, 720—721. Cf. Parke, B., in *Beckham v. Drake* (1849), 11 H. L. C. 579, 626; *Wetherell v. Julius* (1850), 10 C. B. 267; *Hodgson v. Sidney* (1866), L. R. 1 Ex. 313; *Morgan v. Steele* (1872), L. R. 7 Q. B. 611.

(u) For a statement of the principle, see Brett, L.J., in *Castellain v. Preston* (1883), 11 Q. B. D. at pp. 387 *seq.*; Lord Blackburn in *Burnand v. Rodocanachi* (1882), 7 App. Cas. at p. 329.

(a) *Carrington v. Harway* (1662), 1 Keb. 803; *Goodman v. Robinson* (1886), 18 Q. B. D. 332.

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but of property, *i.e.*, the proceeds of the action as and when they are recovered. Thus in *Glegg v. Bromley* (b) an assignment *pendente lite* of the fruits of an action for slander was upheld (c).

Whether, apart from these exceptions, there is any other modification of the rule that a right of action in tort is not assignable, is doubtful. None has been traced so far as judicial decisions go, but there is some ground for thinking that the Courts might take a distinction between assignment of an action for such a purely personal tort as slander (which obviously ought not to be hawked about like a marketable commodity) and assignment of an action for damage to property, *e.g.*, running down a ship, where there appears to be much less objection. At any rate the distinction was thought to be not unreasonable or inconsistent with law and morals a century ago (d).

(b) [1912] 3 K. B. 474.

(c) *Cohen v. Mitchell* (1890), 25 Q. B. D. 262, can also be supported on this ground, although other reasons were given for the decision.

Note that purchase *pendente lite* by an attorney is unlawful: *Simpson v. Lamb* (1857), 7 E. & B. 84; Lord Campbell in *Anderson v. Radcliffe* (1858), E. B. & E. 806, 816.

(d) Park, J., *obiter*, in *Stanley v. Jones* (1831), 7 Bing. 369, 375. Cf. Winfield, *Present Law of Abuse of Procedure*, 68—69.

CHAPTER XXVIII

TORT AND CONTRACT

§ 190. History of relations of Tort and Contract.

§ 190.

Historical.

As was shown in Chapter I, the Law of Tort overlaps to some extent several other branches of the law. Its relation to them has been fully discussed elsewhere (*a*), but it is so strongly marked in one particular topic—the Law of Contract—that some consideration of it is advisable in this book (*b*). This chapter is devoted mainly to an exploration of the territory which Tort and Contract have in common and in a much less degree to some of the leading distinctions between these subjects.

The exposition would be unintelligible without a historical outline, however brief, and we must start with the warning that the ideas of “tort” and “contract”, as we now understand them, would have conveyed little of their meaning to the early lawyers who thought in terms of actions rather than in terms of substantive rights. But, allowing for that, we may say that the early remedies for tort were chiefly trespass, trespass upon the case and action upon the case generally, and that the early remedies for what we should call “breach of contract” were action of debt, action of covenant and action for detainue. But we hasten to add, first, that debt had also a much wider application than a mere claim for a sum of money due and that it was much more akin to a claim for the restoration of money (*i.e.*, a claim for property) than to a claim for breach of contract; and, secondly, that detainue, which was very similar to debt, was also so closely related to tort that, to the end, lawyers could never agree whether it sounded in tort or in contract (*c*).

These remedies in contract were crabbed, hampered by procedural technicalities which need not be detailed here, and inadequate. In the fourteenth century a new remedy was introduced which was destined to have remarkable effects on the law of both contract and tort. This was the action

Assumpsit.

(a) Winfield, *Province of the Law of Tort*.

(b) *Ibid.*, Chap. IV, for greater detail.

(c) Holdsworth, *H. E. L.*, ii, 367—368.

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of *assumpsit* (d). It was based upon the simple idea that if A undertook to perform some act for B, and A misperformed what he had undertaken and B was thereby damaged, B could recover against A.

Now this action began as a special kind of trespass on the case or deceit upon the case and was thus tortious (or delictal) in origin. An early case which foreshadows it (although the report does not use the word "*assumpsit*") occurred in 1348. A had undertaken to transport safely across the Humber B's cattle. He overloaded the boat and the cattle consequently perished. B brought an action upon the case against A who was held liable (e). The case clearly shows the seeds of a concurrence of tort with contract; for it was held to be no defence that B could have sued upon covenant (a form of contract) or upon trespass (a tort) instead of in case for *assumpsit* as he actually did. The germination and growth of these seeds was a gradual process spread over several centuries. The first extension of *assumpsit* was this. In origin it lay for misfeasance—doing ill what ought to have been done well. Then it was extended under the name of *indebitatus assumpsit* to nonfeasance, or not doing at all what you have undertaken to do, but it lay only where the action of debt would lie. Thus it became available as a remedy for breach of a purely executory contract, i.e., for a contract in which there was an express promise and that promise had been wholly unfulfilled (f). Now until *Slade's Case* (1601) (g) it was doubtful whether *indebitatus assumpsit* applied to contract unless there had been an *express* promise, but that case settled that "every contract imports in itself an *assumpsit*" and thus the action came to be a remedy for breach of an implied promise as well as for breach of an express one. This was important, for it frequently happens that the Courts, even if they can find no express statement of a promise, can nevertheless imply one from the evidence. Further, *assumpsit* had so many advantages over the action of debt that it greatly overshadowed that remedy.

*Indebitatus
assumpsit.*

(d) Holdsworth, H. E. L., iii, 428 *seq.*, for a full account of its history.

(e) 22 Lib. Ass. pl. 41.

(f) Note that the promisor was not liable in *indebitatus assumpsit* merely for breach of his agreement. The promisee must also show that the damage which he had suffered was caused by his (the promisee's) having changed his position for the worse in consequence of having made the agreement. Holdsworth, H. E. L., iii, 435.

(g) 4 Rep. 92b, 94a.

The next extension of *indebitatus assumpsit* was still more remarkable. It was allowed as a remedy upon what was called a "contract implied by the law". This was a very different thing from a genuinely implied contract, where the Courts would infer a promise only if the evidence truly showed that there was one. Here, however, they bluntly held that there was a contract where there was none at all. Excellent results followed from this fiction, for it gave birth to nearly the whole of the modern law of quasi-contract; but a fiction it was. For liability in quasi-contract really depends upon the fact that I have unjustly benefited at your expense, not upon any implied promise upon my part to recoup you for that benefit. If I get upon an omnibus without anything said either by myself or by the conductor, there is clearly a genuine implied contract. But if I pay £10 to you mistaking you for your twin brother and you believe that the payment is meant for you, of course you are bound to repay the £10 to me; the scientific reason is because you are unjustly benefited at my expense and are therefore under a quasi-contractual obligation to me; but the law put your liability upon an implied promise on your part to repay me, and that promise is quite imaginary. This last extension of *indebitatus assumpsit* was not established until the beginning of the eighteenth century.

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Extension of
indebitatus
assumpsit.

We may thus sum up the varieties of *assumpsit* :

(a) The old action of *assumpsit* which still remained after the two following species had sprung from it.

(b) *Indebitatus assumpsit* on a genuine contract whether express or implied.

(c) *Indebitatus assumpsit* on the fictitious contract implied by the law in most instances of quasi-contract.

If we were rash enough to risk an anachronism, we might say that here we have instances of liability which arise respectively from (a) tort, (b) contract, (c) quasi-contract. At any rate, it is obvious that the way in which this seed of *assumpsit* had sprouted contained all the possibilities of tort, contract and quasi-contract overlapping one another. That is exactly what happened, and although forms of action have been abolished their substantial effect on the law remains and we can now give some modern illustrations of it.

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Modern
coincidence
of tort and
contract.

(1) Common
calling.

§ 191. Coincidence of tort and contract in modern law.

(1) *Common calling*.—Where a man, by his incompetence in the exercise of a “common calling”, injures another, he is liable in damages. Such a person is a smith, a farrier, a surgeon, an innkeeper, a common carrier. The older lawyers found classification of this obligation of competence a tough affair. Being an instance of the oldest form of *assumpsit*, it arose quite independently of contract, although it is clear that in most instances of it there would be a co-existing contract. Thus, whether a surgeon who negligently injures X by his treatment is hired by X or by some one else (as where X is an infant), X can sue him. After considerable hesitation between tort, contract and quasi-contract, the Courts held that the plaintiff in such circumstances could sue either in tort or (if there were a contract) upon contract (*h*). In *Bretherton v. Wood* (1821) (*i*), this doctrine was clinched. In an action for negligence against a common carrier, the plaintiff alleged alternatively (i) a breach of a duty undertaken for hire or reward (breach of contract), and (ii) a breach of the duty which sprang merely from accepting the plaintiff as a passenger (tort). It was held that although *assumpsit* might have lain in respect of the breach of contract, yet the duty in (ii) was one imposed by law and needed no contract to support it (*k*).

It should be noted that an innkeeper and a common carrier are respectively under a general duty (the exceptions need not be detailed here) towards the public—the innkeeper to receive anyone who applies for accommodation at his inn, the common carrier to receive goods proffered to him for carriage. Breach of this duty is actionable as a tort by the injured party; it is not a breach of contract, for *ex hypothesi* no contract has been formed (*l*).

(2) *Brown v*
Boorman.

(2) *The principle in Brown v. Boorman* (1844) (*m*).—In this case the House of Lords laid it down that wherever there is a contract and something to be done in the course of the

(*h*) For the history, see Winfield, *op. cit.*, 59–62.

(*i*) 3 B. & B. 54.

(*k*) Later decisions illustrating the principle are *Pozzi v. Shipton* (1838), 8 A. & E. 963; *Marshall v. York, Newcastle and Berwick Ry.* (1851), 11 C. B. 655; *Tattan v. G. W. Ry.* (1860), 2 E. & E. 844.

(*l*) This action in tort is an action upon the case, and it was held in *Constantine v. Imperial Hotels, Ltd.*, [1944] K. B. 693, where an innkeeper was sued, that no special damage need be proved.

(*m*) 11 Cl. & F. 1, 44, *per* Lord Campbell.

employment which is the subject of that contract, if there is a breach of duty in the course of that employment, the plaintiff may recover either in tort or in contract.

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Stated in this bare form the principle might appear to make violation of any legal promise a tort and to obliterate the line between contract and tort, and indeed an unsuccessful attempt was made not long after *Brown v. Boorman* to get this interpretation put upon it (n). But the judgment of the Exchequer Chamber in *Brown v. Boorman* (o) clearly shows that the principle is to be limited to cases covered by the old action of *assumpsit* for breach of an undertaking, i.e., to actions against attorneys, surgeons and other professional men; against common carriers, shipowners on bills of lading and bailees. The Court did not profess that this was an exhaustive catalogue, but it is pretty certain that the principle can apply only to contracts *ejusdem generis* with those enumerated by the Court, and it is only the Courts themselves who can tell us what they are. In *Brown v. Boorman* itself, an oil broker who fell within none of the classes mentioned by the Exchequer Chamber was nevertheless included in them. A later decision took in a jobmaster who had let out a defective vehicle (p). On the other hand an architect has been ruled out; his duty is founded upon contract and upon nothing else (q); and it would appear that a stock-broker is in the same position (r).

(3) *Where there is a cause of action in tort, a co-existent claim for breach of contract will not in general affect it.*— This is, to some extent, the converse of the principle in *Brown v. Boorman*, but it is wider in scope. Liability in tort is fixed by the law irrespective of any contract between the parties, although it is possible that in certain circumstances liability in tort may be modified by contract.

(3) Co-existent tort and breach of contract

It must of course be ascertained at the outset whether there are in fact alternative claims; indeed, this is so with all the cases under this section, for otherwise the problem

(n) *Courtenay v. Earle* (1850), 10 C. B. 73, 83.

(o) 3 Q. B. at pp. 525—526.

(p) *Hyman v. Nye* (1881), 6 Q. B. D. 685, 689.

(q) *Steljes v. Ingram* (1903), 19 T. L. R. 534. Note that an architect need not necessarily have professional qualifications.

(r) Slesser, L.J., in *Jarvis v. Moy*, [1936] 1 K. B. 399, 406; but, with respect, the reasoning is not convincing. An interesting historical example of the principle in *Brown v. Boorman* was an express warranty on a sale of goods: *Winfield, op. cit.*, 66—68.

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cannot arise. A good practical test is this. The action is founded on contract, and on contract only, if, supposing the claim upon it were struck out of the pleadings, no ground of action would remain (s). The particular form of action alleged is not the determinant factor; the vital question is, "What is the substance of the claim? Contract or tort?" (t).

Where there is a substantial claim in tort, the plaintiff need not allege the existence of a contract, although it is probable that one was made; *e.g.*, where a medical man is called in and bungles the treatment of a patient (u). Much less can a defendant, whose substantial liability is in tort, thrust upon the plaintiff a contract which he never alleged, as where a dentist was held liable in tort for injuring his patient's jaw (a).

If there are substantial claims in both tort and contract, the plaintiff can recover on either, subject to the provisions of the County Courts Acts of which we shall speak shortly. This has been frequently illustrated in accident claims against railway companies, although the rule is not limited to them (b). The principle, which has now been established for some time, is that any passenger who has been injured by the negligence of the company can sue them in tort if they have invited or knowingly permitted him to enter the train, whether or not there is also a contract for carriage between him and the company. That was the ground taken by Blackburn, J., in *Austin v. G. W. Ry.* (c). A woman and her child were travelling in the defendants' train, and the child was injured by the defendants' negligence. The mother had bought a ticket for herself, but none for the child, as she honestly believed that none was required. The child was held entitled to recover damages, for it had been accepted as a passenger. Some of the other Judges put their decision on the much less felicitous ground that there was a contract to carry the mother and the child, but this strains the law of contract to

(s) *Legge v. Tucker* (1856), 1 H. & N. 500, decided this before the Judicature Act, 1873, and since that Act the test appears to hold good: A. L. Smith, L.J., in *Turner v. Stallbrass*, [1898] 1 Q. B. 56, 58.

(t) *Turner v. Stallbrass* (last note), and Bramwell, L.J., in *Bryant v. Herbert* (1878), 3 C. P. D. 389.

(u) *Gladwell v. Steggall* (1839), 5 Bing. N. C. 733; *Pippin v. Sheppard* (1822), 11 Price 400; *De Freville v. Dill* (1927), 96 L. J. K. B. 1056.

(a) *Edwards v. Mallan*, [1908] 1 K. B. 1002.

(b) *Dalyell v. Tyrer* (1858), 13 B. & E. 899.

(c) (1867), 8 B. & S. 327.

creaking point (d). However, Blackburn, J.'s, view was the basis of later decisions (e). Of course, if the plaintiff has not been accepted as a passenger, or if the acceptance is due only to his fraud, he is a trespasser and has no greater rights than any other trespasser. Such is one who slips unobserved into the train and hides under a seat, or one who steals a ticket.

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If the wrong alleged is neither a breach of contract nor a tort, no action will lie. This axiom would not have been worth stating but for some ingenious but unsuccessful attempts on the part of pleaders to set it at naught (f).

(4) *Third parties and alternative claims.*—Up to this point we have been examining alternative claims between the same parties. We now pass to cases in which third parties are concerned. (4) Third parties.

First, the same plaintiff may have alternative claims against John in tort and against Peter in contract. Now these claims are not mutually exclusive. He can pursue either of them. Thus in *Foulkes v. Metropolitan District Ry.* (g), the X Railway Co. owned the line and platform at Richmond and, under a contract with the Y Railway Co., they allowed Y running powers over the line there. The plaintiff bought from X his ticket for a return journey to Richmond and travelled (as he was entitled to do) in Y's train. On alighting at Richmond, he was injured by a fall due to the fact that the level of the platform was too low in relation to the level of the carriage floor. He sued the Y Co. who were held liable (i) because probably there was a contract between them and the plaintiff for safe carriage; (ii) because they had certainly committed the tort of negligence in having broken the duty cast upon them by their acceptance of him as a passenger; that duty required them not only to provide a safe vehicle but also a safe means of quitting it. If the plaintiff had preferred to sue the X Co. for breach of their

(d) Still less happy was the view of Cockburn, C.J., that even if the mother had misrepresented the child's age in order to get a free pass for it, the child could still have recovered against the defendants.

(e) *Foulkes v. Metropolitan District Ry.* (1879), 4 C. P. D. 267; 5 C. P. D. 157; *Kelly v. Metropolitan Ry.*, [1895] 1 Q. B. 944, 946. The duty extends also to a passenger's luggage: *Marshall v. York, etc., Ry.* (1851), 11 C. B. 655. *Denion v. G. N. Ry.* (1856), 5 E. & B. 860, is now probably incapable of being supported on either ground on which it was decided. Pollock, Torts, 235, 432; and Contract (12th ed. 1946), 12, 15.

(f) *Tollit v. Sheistone* (1839), 5 M. & W. 283; *Howard v. Shepherd* (1850), 9 C. B. 297.

(g) (1880), 5 C. P. D. 157.

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contract with him, he could have done so successfully and they would apparently have also been liable in tort for negligence.

The like law applies where, on the same facts, one wrongdoer has exposed himself to separate actions by A for breach of contract and by B for tort. The absence of any such contract would not release him from liability in tort. The presence of it is equally irrelevant on that point (*h*).

In none of these cases are full damages recoverable twice over. Thus if the claim in tort is fully satisfied, in general only nominal damages would be recoverable for that in contract; but, as we shall see almost immediately, the rules as to remoteness of damage in tort are different from those for breach of contract, and in some circumstances much more may be recoverable under the one head than under the other.

Privity of
contract.

So far there is little difficulty, but the clear principles enunciated in this sub-section have been somewhat obscured by a distortion of the doctrine that no one except the parties to a contract can sue for a breach of it. This doctrine, known as "privity of contract", is perfectly sound and is well established. But it was wrongly applied to the prejudice of another equally sound doctrine that if A breaks his contract with B in such a way as to commit a tort against C, C can sue A in tort. In such a case, the contract between A and B has nothing to do with C. Suppose that I hire a horse from you and by negligent riding knock over C and injure the horse. C sues me for the tort of negligence whereby he has been injured. What does it matter to him whether I am also liable to you for breach of contract in injuring the horse? The question seems to answer itself. Yet until recently there were some decisions that proceeded upon the illogical inference that because there is no contract between A and C, therefore there can be no liability of A in tort to C. We have already explained how this came about (*i*), and how the majority of the House of Lords in *Donoghue v. Stevenson* (*k*) exploded the fallacy.

(*h*) *Meux v. G. E. Ry.*, [1895] 2 Q. B. 387 (negligent injury to livery of plaintiff's servant, the contract of carriage being with the servant; the livery belonged to the master, who recovered damages in tort for negligent injury to it). So, too, *Marshall v. York, etc., Ry.* (1851), 11 C. B. 655.

(*i*) *Ante*, § 160; 34 *Columbia Law Review* (1934), 41-66; Winfield, *op. cit.*, 73-76.

(*k*) [1932] A. C. 562.

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County
Courts Acts.

It is fairly obvious from the contents of this chapter that a sharp severance of tort from breach of contract is, even at the present day, impossible for the Common Law. In one direction, however, Parliament has achieved, with dubious results, what the Common Law regarded as impracticable. The County Courts Acts have set up an artificial distinction between actions upon contract and actions in tort. When these Courts were created by an Act of 1846, the object of the Legislature was to cheapen legal procedure for the recovery of small claims and the Act, in order to compel litigants to take advantage of this procedure, penalised a plaintiff in the matter of costs if he brought an action in one of the higher Courts which could have been sued in a County Court and if he recovered less than a certain minimum sum fixed by the Act (l). Now this minimum was less in an "action founded on tort" than in an "action founded on contract", and succeeding Acts repeated this distinction. It is now embodied in the County Courts Act, 1934 (m), which (for the purpose of getting a higher scale of costs) makes the minimum £50 for tort and £100 for contract. It follows, then, that if a plaintiff recovers some sum between £50 and £100 in an action in the High Court which he ought to have brought in the County Court, it becomes a vital matter to him in the question of costs to know whether his action was founded on tort or on contract. The Courts have had to decide this question on several occasions, and they have been considerably embarrassed by the fact that the County Courts Acts in effect tell them, "You must decide this action to be either in tort or on contract". But this has two awkward results. First, it ignores the existence of quasi-contract and, secondly, it sets up a statutory exception to the rule that a plaintiff can allege in the same action two different causes of action and that he will have the benefit of whichever he establishes (n). The Courts have done their best to give effect to the legal dichotomy thrust upon them by making the test, "Which is the substantial cause of action? Contract or tort?" (o). But the test breaks down or becomes merely Procrustean,

(l) 9 & 10 Vict. c. 95, s. 129.

(m) 24 & 25 Geo. 5, c. 53, s. 47; if less than £10 in tort or £40 in contract ~~are~~ recovered, the plaintiff will get no costs at all.

(n) Lindley, L.J., in *Taylor v. M. S. & L. Ry.*, [1895] 1 Q. B. 134, 138; Collins, M.R., in *Sachs v. Henderson*, [1902] 1 K. B. 612, 616.

(o) Slessor, L.J., in *Jarvis v. Moy*, [1936] 1 K. B. 399, 406.

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where the plaintiff shows on the same facts a substantial cause of action in both contract and tort (*p*). Nor, apart from this, are all the decisions easily reconcilable (*q*). But confusion of this sort is almost inevitable when Parliament, in reforming the law, ignores its history.

Measure of damages.

The measure of damages in alternative claims.—If, apart from the County Courts Act, the plaintiff establishes that his claim is just as substantial in tort as for breach of contract, to what amount of damages is he entitled? The question is a practical one because there are differences on this point between the law of tort and the law of contract.

Thus vindictive or exemplary damages are recoverable in tort, but not in general for breach of contract.

Remoteness of damage.

Much more important are the differences in the rules as to remoteness of damage. We have endeavoured to state what they are in tort (*r*). In contract what are called the rules in *Hadley v. Baxendale* (*s*) apply:

(i) Damages for breach of contract should be “such as may fairly and reasonably be considered either arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it”.

(ii) If there are special circumstances under which a contract was made and they were wholly unknown to the party breaking the contract, he may be liable for general damages, but he is not liable for damages due solely to those special circumstances.

Thus in *Hadley v. Baxendale* itself, the plaintiffs, who were mill-owners, delivered a broken shaft to the defendants, who were common carriers, instructing them to deliver it immediately to X for repair. Owing to the defendants' delay in the delivery, the plaintiffs had to stop their mill and thus they lost profits. The loss of these was held to be too remote; for, although the defendants knew that the mill had ceased working because the shaft had broken, they knew nothing

(*p*) *E.g.*, *Pontifex v. M. Ry.* (1877), 3 Q. B. D. 23.

(*q*) *E.g.*, *Tattan v. G. W. Ry.* (1860), 2 E. & E. 844, and *Heming v. M. S. & L. Ry.* (1878), 4 Q. B. D. 81.

(*r*) *Ante*, § 21.

(*s*) (1854), 9 Ex. 341, 354—355.

of the special circumstance that the profits of the mill would be stopped by their breach of contract.

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Now whatever difficulties there may be about ascertaining the rules of remoteness in tort, one thing is beyond question. The second rule in *Hadley v. Baxendale* marks a sharp difference between tort and contract, for in tort a man is many a time held liable for damages arising from special circumstances of which he had no knowledge (*t*). Moreover, it is tolerably certain that the rules as to contract have not been affected by the decision in *Re Polemis* (*u*), although the facts in that case might be regarded as constituting a breach of contract as well as a tort (*a*).

Let us assume, then, that the plaintiff has proved on the same facts alternative claims in tort and for breach of contract and that he would get damages on a higher scale in one of these claims than in the other. Is he to be deprived of the higher award simply because he has alleged alternatively the other claim? The common-sense answer would seem to be: "If he has really established the claim which carries the greater amount of damages, he ought to be entitled to that".

But whether this is the correct answer in law is not entirely free from doubt. In 1909 Lord James of Hereford thought that it was the correct answer. "During many years when I was a junior at the Bar", he said, "when I was drawing pleadings, I often strove to convert a breach of contract into a tort in order to recover a higher scale of damages, it having been then as it is now, I believe, the general impression of the profession that such damages cannot be recovered in an action of contract as distinguished from tort. . . . That view, which I was taught early to understand was the law in olden days, remains true to this day" (*b*). Moreover, in *France v. Gaudet* (1871) (*c*), the Court of Queen's Bench had taken the same view in a case where the defendants' wrong amounted to the tort of conversion as well as to a breach of contract and they were held liable for the higher scale which, on the facts of the case, were claimable for conversion. *France v. Gaudet* was distinguished by the majority of the Court of Appeal

(*t*) *The Argentino* (1889), 14 App. Cas. 519, carries this point.

(*u*) [1921] 3 K. B. 560.

(*a*) *Ante*, p. 68, note (*r*).

(*b*) *Addis v. Gramophone Co., Ltd.*, [1909] A. C. 488, 492.

(*c*) L. R. 6 Q. B. 199.

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(Greer and Maugham, L.JJ.) in *The Arpad* (d). It is hard to say exactly what was the attitude of the learned Lords Justices towards the proposition now under discussion, but upon the whole their decision is perhaps to be limited to the facts before them (which showed both conversion and breach of contract); and it does not appear to militate against the view that, as a general rule, the higher scale is recoverable, nor even against the view that in some circumstances higher damages are recoverable for conversion where that is a claim alternative to one for breach of contract (e). And it is notable that Scrutton, L.J., in a dissenting judgment adopted the principle supported by *France v. Gaudet* (f).

It is clear, however, that a plaintiff cannot evade a substantive rule of law by framing his claim alternatively, whether he does so for the purpose of swelling the amount of damages or in order to secure any other advantage. Thus, no minor can be made liable in contract by endeavouring to sue him in tort (g).

In marking the points of intersection of contract and tort we have incidentally noticed some of the differences between these branches of the law. Others were considered in earlier chapters, e.g., on the definition of tort, the application of *volenti non fit injuria* and the periods of limitation of actions, and we can end with cross-references to them (h).

(d) [1934] P. 189, 219—221, 234—236.

(e) Greer, L.J., at p. 221, expressly reserved his opinion as to the damages recoverable for personal injuries arising from a wrong which is both a tort and a breach of contract. Maugham, L.J., at p. 234, said that he was dealing only with the case of an action of trover "where though technically the facts may be held to amount to conversion by the defendant to his own use, yet the real ground of the action is breach of contract to deliver".

(f) At pp. 202—206. See Professor A. L. Goodhart's discussion of *The Arpad* in 2 *Toronto University Law Journal* (1937), 12—13. *Chinery v. Viall* (1860), 5 H. & N. 288, is difficult to reconcile with the principle: Winfield, *op. cit.*, 80—81.

(g) *Green v. Greenbank* (1816), 2 Marshall 485.

(h) *Ante*, §§ 3, 4, 13, 188.

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